

**The Buffalo Newspaper Guild, Local 26, and the Newspaper Guild, AFL-CIO-CLC (Buffalo Courier Express, Inc.) and William L. Bail.** Cases 3-CB-2678, 3-CB-2717, 3-CB-2955, 3-CB-3003, 3-CB-3004, and 3-CB-3182

November 12, 1982

### DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On May 8, 1981, Administrative Law Judge Robert C. Batson issued the attached Decision in this proceeding. Thereafter, Respondent, the General Counsel, and Charging Party Ball filed exceptions and supporting briefs, and Respondent and Charging Party Ball filed answering briefs and further responses thereto. Charging Party Ball also filed a motion to reopen the hearing, which Respondent has opposed.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the rulings,<sup>2</sup> findings,<sup>3</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.<sup>4</sup>

We find merit in the exceptions of both the General Counsel and Respondent to the Administrative Law Judge's factual finding that the Board had expressly permitted Charging Party Ball to file a unit clarification petition with the Board's office in Region 3. In a letter to the Board's Executive Secretary, dated June 18, 1975, Ball requested authorization to file a unit clarification petition for the

purpose of excluding alleged supervisors from a bargaining unit of Buffalo Courier-Express employees represented by Respondent. In reply, the Board's Executive Secretary prepared a letter dated June 24, 1975, informing Ball:

Section 102.60(b) of the Board's Rules and Regulations provides that "a petition for clarification of an existing bargaining unit . . . may be filed by a labor organization or by an employer." I have no authority to waive this rule or any other of the rules and regulations which the Board has adopted. If you wish to pursue this matter, and bring it to the Board's attention, you might do so by filing a unit-clarification petition in the Buffalo Regional Office, and, if the petition is dismissed, appeal the Regional Director's action to the Board. [Emphasis supplied.]

The record does not disclose that Ball had any further communication with the Board regarding this matter prior to his filing of the unit clarification petition on March 10, 1976. Based on these facts, it is clear that no permission or waiver had been provided Ball by the Board prior to his filing that petition. Notwithstanding these revised factual findings, for the reasons stated below, we agree with the Administrative Law Judge's legal conclusion that Respondent violated Section 8(b)(1)(A) by conducting intra-union proceedings against Ball for having filed the petition.

Respondent's action against Ball in this regard is inconsistent with the overriding policy not to prevent or limit access to the Board's processes.<sup>5</sup> With regard to that policy, we agree with the General Counsel's contention that the filing of a unit clarification petition is more analogous to the filing of an unfair labor practice charge<sup>6</sup> and reject Respondent's view likening it to the filing of a decertification petition.<sup>7</sup> As stated in *Van Camp Sea Food Co., Inc.*,<sup>8</sup> a Board proceeding consisting solely of the "objective appraisal of fixed events":

At no stage of the proceeding is there occasion for influencing or persuading employees

<sup>1</sup> Charging Party Ball has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

<sup>2</sup> Charging Party Ball's motion to reopen the hearing for the purpose of introducing specified documentary evidence is denied as lacking in merit. Two of the five documents now proffered already have been included in the record as Respondent's Exhs. 32 and 33 and the other documents were available at the time of the hearing but were not sought to be introduced as evidence.

<sup>3</sup> The General Counsel and Charging Party Ball have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In his Decision the Administrative Law Judge found Ball held the position of Courier-Express unit grievance chairman from September 1975 until approximately April 1976. The evidence reveals that his tenure was of shorter duration, from late October 1975 to no later than early February 1976.

<sup>4</sup> We have conformed the Administrative Law Judge's recommended Order and notice.

<sup>5</sup> See, generally, *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969); *Local 138, International Union of Operating Engineers, AFL-CIO* (Charles S. Skura), 148 NLRB 679 (1964).

<sup>6</sup> In his brief the General Counsel has cited, *inter alia*, *N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers of America [United States Lines Co.]*, 391 U.S. 418 (1968).

<sup>7</sup> Respondent, in support of its position, points out that the unit clarification petition was an attack on the collective-bargaining position of Respondent Local, similar to that inherent in the filing of a decertification petition, for which the Board has allowed the expulsion of a union member, citing *Tawas Tube Products, Inc.*, 151 NLRB 46 (1965).

<sup>8</sup> *Cannery Workers Union of the Pacific, affiliated with the Seafarers International Union of North America, AFL-CIO* (*Van Camp Sea Food Co., Inc.*), 159 NLRB 843, 849 (1966).

to support a particular disposition of the matter. Neither their subjective views concerning the events involved in the charge nor their solidarity with their fellow union members can have any legitimate effect on the outcome. The Board here is concerned, not with their views, choices, or mutual support, but with the vindication of the public interest in securing obedience to the statute. There is, therefore, no justification for permitting the public policy of the Act to be circumvented through the imposition of disciplinary action against the employee for having filed a charge with the Board.

This general statement regarding charges filed under Section 8 of the Act is likewise applicable to petitions for unit clarification filed under Section 9 of the Act.<sup>9</sup> The processing of a unit clarification petition on its merits also entails the development of a record to allow the Board to make an "objective appraisal of fixed events" and thereby adjudicate the merits of the petition.

Moreover, it is obvious from Charging Party Ball's letter to the Board's Executive Secretary that Ball's intent in filing the unit clarification petition was to exclude from the unit persons whom he believed to be supervisors, some of whom were alleged to be officers and agents of Respondent. He further claimed that his attempts to have Respondent file the unit clarification petition were frustrated by these latter individuals and that his actions had resulted in extreme hostility on their part. These contentions, while not filed in the form of an unfair labor practice charge, clearly amount to a request that the Board remedy a perceived wrong.<sup>10</sup>

Respondent's characterization of Ball's petition for unit clarification as being an attack on the Union's collective-bargaining position is insufficient to privilege its actions against Ball. This Board previously has held that in certain situations members who act against a union's interest are immune from internal union discipline on that ground.<sup>11</sup> In this

instance, it appears that, to the extent Ball might have been successful in processing the unit clarification petition, the intended result would have been a Board determination that certain individuals be excluded from the bargaining unit due to their supervisory status. Such a result would have had no direct adverse effect on Respondent's ability to act as bargaining representative of unit employees, as distinct from any indirect benefits resulting from representing a unit of supervisors as well as employees. In any case, a Board determination on this matter may not properly be deemed an attack on Respondent's legitimate interest.<sup>12</sup>

As stated above, Respondent is correct in the claim that there has been no waiver of the application of Section 102.60(b) of the Board's Rules and Regulations and Statements of Procedures, which states that unit clarification petitions may be filed either by a labor organization or by an employer. Accordingly, the Acting Regional Director for Region 3 properly dismissed the petition on March 23, 1976, on the ground that the clear and unambiguous language of that section precludes the processing of a unit clarification petition filed by an individual. However, we reject the argument made by Respondent that, because Ball's petition was not authorized by the Board's current rules and procedures, his attempt to file the petition on an individual basis is not deserving of protection. As stated in the Executive Secretary's letter to Ball, one vehicle for contesting the propriety of the Board's rules is to proceed in a manner contrary to the rules and then appeal an adverse ruling. In this regard, we note that the circumstances under which the Board has allowed the filing of unit clarification petitions have been modified as a result of administrative experience to allow for the filing of a unit clarification petition where it had not earlier been authorized.<sup>13</sup> Proceedings initiated for the purpose of requesting that the Board reconsider existing policy are as deserving of protection as those filed in con-

<sup>9</sup> In *Van Camp* the Board noted that "proceedings under Section 9 of the Act are no less within the public domain." *Id.* at 849. We continue to adhere, however, to our general statement in *Van Camp* that there are "significant differences" in Sec. 9 proceedings involving election campaigns.

<sup>10</sup> In so finding, we agree with the General Counsel's contention that the following statement by the Supreme Court is applicable to this case:

A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances. Any coercion used to discourage, retard, or defeat that access is beyond the legitimate interests of a labor organization. [*Industrial Union of Marine & Shipbuilding Workers, supra* at 424.]

<sup>11</sup> See, for example, *Freight Drivers and Helpers Local Union No. 557, affiliated with International Brotherhood of Teamsters, Chauffeurs, Ware-*

*housemen and Helpers of America (Liberty Transfer Company, Inc.)*, 218 NLRB 1117, 1120 (1975); *Cannery Warehousemen, Food Processors, Drivers and Helpers Local Union No. 788, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Marston Ball)*, 190 NLRB 24, 26-27 (1971). Compare *Scotfield, supra*; *Local 5795, Communications Workers of America, AFL-CIO (Western Electric Co., Inc.)*, 192 NLRB 556 (1971).

<sup>12</sup> We therefore find inapposite Board decisions involving a union's interest in defending or promoting its status as bargaining representative. See *Amalgamated Meat Cutters and Allied Workers of North America, Local 593, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (S & M Grocers, Inc.)*, 237 NLRB 1159 (1978), and cases cited therein.

<sup>13</sup> For example, unit clarification petitions are now entertained with respect to bargaining units where the representative is either certified or recognized. Compare Sec. 101.17 of the Board's Rules and Regulations with *The Bell Telephone Company of Pennsylvania*, 118 NLRB 371 (1957), where a unit clarification petition was dismissed in the absence of a previous Board certification.

formity with existing standards. In any event, it is for the Board and its regional offices, not private parties, to determine whether an individual is authorized to initiate proceedings with the Board.<sup>14</sup> For the reasons stated above, we adopt the Administrative Law Judge's finding of an 8(b)(1)(A) violation in this matter.<sup>15</sup>

With respect to another section of the underlying Decision to which Respondent has excepted, we find merit in the contention that the fine imposed on Ball for having filed EEOC charges was not independently violative of Section 8(b)(1)(A). In his Decision, the Administrative Law Judge found that Respondent lawfully expelled Ball for having filed the EEOC charges in his official capacity as grievance chairman without proper authorization, but that the resulting fine imposed on Ball was unlawful insofar as the amount of the fine, \$1,125, was based on the dues Respondent otherwise would have expected to receive from him. We find insufficient basis in the present record to warrant the above factual finding on which this conclusion is grounded. First, the Administrative Law Judge incorrectly stated that the individual who proposed the dues-related formula at the intra-union proceeding was a trial board member. The individual, Richard Baldwin, has been identified by both the General Counsel and Respondent as the prosecutor in this intra-union proceeding.<sup>16</sup> In addition, it appears that this was but one of several proposals presented by Baldwin in support of a recommended fine and that the amount recommended under the dues-related proposal was in excess of \$8,000.<sup>17</sup> In announcing its decision that the fine should be \$1,125, the trial board did not indicate the basis it

used in determining the amount of the fine and the General Counsel has not presented evidence otherwise indicating the basis for that amount. Therefore, in view of the disparity between the amount of the proposed fine under the dues-related formula and the amount of the actual fine, as well as the fact that Baldwin was not a member of the trial board, we find that the General Counsel has not established by a preponderance of the evidence that Ball's fine was related to dues which would be forgone due to his expulsion from Respondent. Further, we will not otherwise inquire into the reasonableness of the fine as that is an internal union matter protected by the proviso to Section 8(b)(1)(A) of the Act.<sup>18</sup>

Finally, we find merit in the General Counsel's contention that Respondent Local violated Section 8(b)(1)(A) as a result of certain threats made to employee Eric Greenberg. The Administrative Law Judge did not discuss this incident in his Decision and accordingly implicitly dismissed the relevant complaint allegation which was fully litigated at the hearing. The uncontroverted evidence reveals that in a memo dated August 18, 1977, Joe Wilhelm, unit chairperson for Respondent Local, informed Greenberg that:

If within 72 hours, you have failed to furnish the Guild with a *signed checkoff form* and the \$3 fee, the Guild will demand to management that you be dismissed. [Emphasis supplied.]

According to the testimony of Wilhelm, Greenberg paid his initiation fee and signed the checkoff authorization soon after he received the memo. Although Wilhelm subsequently was informed by Richard Roth, Respondent Local's president, that he was in error to require the signing of a checkoff form, this information never was conveyed to Greenberg.<sup>19</sup> Considering the evidence, set forth above, we find that Respondent threatened employee Greenberg in violation of Section 8(b)(1)(A) of the Act. *International Union of Electrical, Radio and Machine Workers, Local 601, AFL-CIO (Westinghouse Electric Corporation)*, 180 NLRB 1062 (1970); *Siro Security Service, Inc.*, 247 NLRB 1266 (1980).

<sup>14</sup> See *General Services, Inc.*, 229 NLRB 940 (1977), where the Board similarly stated that the status of a charging party to an unfair labor practice proceeding and the merits of his charge is solely for the Board to decide.

<sup>15</sup> In view of our rationale for finding this 8(b)(1)(A) violation, we find it unnecessary to rely on *International Molders' and Allied Workers Union, Local No. 125, AFL-CIO (Blackhawk Tanning Co., Inc.)*, 178 NLRB 208 (1969), in which Members Fanning and Jenkins dissented, to support our conclusion here as it relates to the fine imposed on Ball for having filed the unit clarification petition.

<sup>16</sup> The trial board in that proceeding consisted of Robert Buyer, Kelly Simon, Morton Carpenter, and George Sullivan.

<sup>17</sup> Baldwin's proposals consisted of the following, according to the transcript of the intra-union proceeding:

And, we seek the penalty not so much because it would work a hardship on him. We're not interested in that. We seek it, because we think it's the appropriate penalty for the violation. But, acknowledging he would be a free rider we think it only fair that some fine be imposed. One way of figuring out how much that fine would be would be to assess him an amount roughly equal to what his dues would be if he remained a dues payer. And, if you calculate that at thirty-five bucks a month for twelve months a year or for the remaining twenty years or so of his working career, I come to over eight thousand dollars. There are other ways you can do it. You can fine him a month's pay or ten percent of a year's pay, whatever you like. I think there should be a fine. Most importantly, I think he should be expelled. We ask that you find him guilty. We ask for a severe penalty. That is all.

<sup>18</sup> See *N.L.R.B. v. Boeing Co., et al.*, 412 U.S. 67 (1973); *San Diego County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Campbell Industries)*, 243 NLRB 147 (1979). As stated in *Boeing*, the issue of the reasonableness of the fine may be properly adjudicated by local courts according to state law. *Id.* at 74.

<sup>19</sup> In view of the failure to notify Greenberg, it is unnecessary to determine whether Roth corrected Wilhelm in August, as testified by Roth, or in October, as testified by Wilhelm.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, The Buffalo Newspaper Guild, Local 26, and The Newspaper Guild, AFL-CIO-CLC, Buffalo, New York, their officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(d):

"(d) Threatening employees with discharge if they fail to sign checkoff authorization forms for The Buffalo Newspaper Guild, Local 26, or any other labor organization."

2. Substitute the following for paragraph 2(b):

"(b) Continue to perform its statutory duty to provide its expelled member, William L. Ball, with fair representation and not attempt to affect his employment."

3. Substitute the attached notice for that of the Administrative Law Judge.

## APPENDIX

NOTICE TO MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT file internal union charges against our members who file petitions with the National Labor Relations Board seeking to clarify the composition of an appropriate unit.

WE WILL NOT prosecute before an internal union trial board any member who files a petition with the National Labor Relations Board seeking to clarify an appropriate unit.

WE WILL NOT find any member guilty of violating The Newspaper Guild's constitution because that member has filed a petition with the National Labor Relations Board seeking to clarify an appropriate unit.

WE WILL NOT threaten employees with discharge if they do not execute checkoff authorization forms.

WE WILL NOT in any other manner interfere with, restrain, or coerce our members in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL expunge from our files all records and documents relating to the internal union charges, the trial board proceedings, and the trial board decision against William L. Ball in relation to the charges against him for filing the unit clarification petition, and We Will so notify William L. Ball of this action in writing.

WE WILL continue to perform our statutory duty to provide our expelled member, William L. Ball, with fair representation and will not attempt to affect his employment.

THE BUFFALO NEWSPAPER GUILD,  
LOCAL 26

THE NEWSPAPER GUILD, AFL-CIO-  
CLC

## DECISION

## STATEMENT OF THE CASE

ROBERT C. BATSON, Administrative Law Judge: The hearing<sup>1</sup> in this consolidated proceeding under the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* (herein the Act), except for Case 3-CB-3182,<sup>2</sup> commenced before me on January 16, 1978, based upon a consolidated complaint issued in Cases 3-CB-2678 and 3-CB-2717, on August 31, 1976; a complaint in Case 3-CB-2955 issued on July 26, 1977; a consolidated complaint in Cases 3-CB-3003 and 3-CB-3004 issued on September 28, 1977, and in Case 3-CB-3182, which subsequently issued on June 28, 1978, as consolidated with other cases which were disposed of by settlement as hereafter described. These complaints and various orders consolidating them were all issued by the Regional Director, or the Acting Regional Director, for Region 3 (Buffalo, New York) arising out of charges filed by William L. Ball, an individual,<sup>3</sup> alleging that The Buffalo Newspaper Guild, Local 26, and/or The Newspaper Guild, hereinafter variously called the "Respondent" or "Respondents," the "Union" or "Unions," "Local 26," or the "Guild," had committed numerous violations of Section 8(b)(1)(A) of the Act. The complaint allegations

<sup>1</sup> During this long and procedurally complicated hearing, counsel and *pro se* appearances were made on behalf of various other respondents and charging parties. However, since all complaint allegations relating to these parties were settled during the course of, and after, the hearing as more fully described herein, and the complaints relating to them have heretofore been dismissed by me, those appearances will not be shown here.

<sup>2</sup> Case 3-CB-3182 was among the cases which I ordered consolidated with this consolidated case on September 26, 1978. Also, in the original caption was Buffalo Courier Express, Inc., and Kenneth W. Kostolecki, Case 3-CA-6955. This is one of the cases in which a settlement agreement was approved by me during the course of the hearing. Upon the General Counsel's motion to me dated April 5, 1979, asserting that compliance with the settlement agreement had been achieved, I issued an order dismissing the complaint.

<sup>3</sup> These charges were filed on the dates as follows: Case 3-CB-2678 on February 11, 1976; Case 3-CB-2717 on April 26, 1976; Case 3-CB-2955 on June 10, 1977; Cases 3-CB-3003 and 3-CB-3004 on August 5, 1977; and Case 3-CB-3182 on April 26, 1978. All charges were properly served on all parties.

assert numerous threats of reprisals against the Charging Party, hereinafter called Ball and other union members, because of their association or relationship with Ball, by various officers and agents of Respondents. However, the most serious allegations by far, about which the facts are not in significant conflict, involve the filing of three separate internal union disciplinary charges against Ball which resulted in Ball's being tried on all three charges before an internal union trial board, in accordance with the Union's constitution and bylaws. As a result of this trial, Ball was expelled from the Union and assessed fines on two counts, and on the third count he was reprimanded and assessed a fine.

Testimony and other evidence relevant to the above, and other allegations which subsequently settled, were presented to me from January 16, 1978, through February 9, 1978. On that date I granted, without objections, the General Counsel's motion to adjourn the hearing *sine die*, in order to allow the Regional Office time to investigate and make a determination as to the merits of several additional charges involving the parties herein as well as other parties. It was asserted by the General Counsel and the other parties that the issues raised by these additional charges were intricately related to the issues in this case and, if complaints issued upon them, they should be consolidated herewith.

On June 28, 1978, the Regional Director issued an order consolidating cases and complaint and notice of hearing arising out of 10 additional charges<sup>4</sup> alleging additional violations of the Act by the Respondent Union herein as well as several additional respondent-unions and employers.<sup>5</sup> On July 11, 1978, counsel for the General Counsel filed with me a motion to consolidate for hearing the consolidated complaint issued on June 28, 1978, with the cases upon which hearing had commenced on January 16, 1978. On July 31, 1978, the General Counsel filed a supplemental document in support of his July 11 motion. On August 23, 1978, I issued an Order To Show Cause to all parties why the General Counsel's motion should not be granted. I received several responses—three in support of, and three in opposition to the motion. On September 26, 1978, I granted the General Counsel's motion and issued an Order consolidating cases and rescheduling hearing.<sup>6</sup> The hearing on the consolidated cases resumed on January 8, 1979, and closed on February 14, 1979. Prior to the opening of the reconvened hearing, on October 20 and December 20 and 27, 1978, the General Counsel filed with me motions and notices of intention to amend various of the complaints. These motions were granted.

As heretofore noted, during the course of the resumed hearing all Respondents, Charging Parties, and the Gen-

eral Counsel entered into settlement agreements, both informal and outside the Board's processes remedying all of the unfair labor practice allegations of the June 28, 1978, consolidated complaint except some of those arising out of Case 3-CB-3182, as well as all amendments to that complaint made by the October 20 and December 20 and 27, 1978, amendments. Upon being satisfied that compliance with these voluntary agreements would effectuate the purposes of the Act, I approved the settlement agreements and dismissed the complaints out of which allegations arose. Some of the allegations of the complaints now before me were also settled.

All issues remaining in this case were fully litigated at the hearing. All parties participated throughout by counsel, or *pro se*, were afforded full opportunity to call, examine, and cross-examine witnesses, present all relevant evidence, make oral argument, and file post-hearing briefs. Helpful briefs were received from counsel for the General Counsel, the Respondent, and the Charging Party.<sup>7</sup>

Upon the entire record in this case,<sup>8</sup> including consideration of all briefs and oral arguments, and my observation of the testimonial demeanor of the numerous witnesses testifying under oath, and upon substantial and reliable evidence, I make the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF THE EMPLOYER

Buffalo Courier-Express, Inc., herein called the Employer or the Company, is a New York corporation maintaining its principal office and place of business at Buffalo, New York, where it is engaged in the publication and distribution of a daily newspaper. During the 12-month period immediately preceding the issuance of the complaint herein, it received gross revenues in excess of \$200,000. During the same period of time it purchased and received goods valued in excess of \$50,000 from points located directly outside the State of New York.

The parties concede, and I find, that the Company was at all material times an employer within the meaning of Section 2(2) of the Act and engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The Buffalo Newspaper Guild, Local 26, and The Newspaper Guild, AFL-CIO, as the parties concede, and I find, was at all material times a labor organization within the meaning of Section 2(5) of the Act.

<sup>4</sup> The charges were docketed as Cases 3-CA-8183, 3-CA-8237, 3-CA-8438, 3-CB-3050, 3-CB-3063, 3-CB-3071, 3-CB-3088, 3-CB-3089, 3-CB-3090, were all filed by Kenneth W. Kostolecki, an individual, and Case 3-CB-3182, filed by William L. Ball, an individual.

<sup>5</sup> In view of the fact that all complaint allegations on all charges except Case 3-CB-3182 were settled and compliance with settlement agreements has been achieved and the complaints dismissed, it is not necessary in this Decision to set forth the allegations or the parties.

<sup>6</sup> One of the Respondent-Employers no longer involved in this case filed a special appeal with the Board to this Order. The appeal was denied by the Board on December 1, 1978.

<sup>7</sup> Over the objections of counsel for the General Counsel and the Charging Party, I granted the Respondent's motion to file a reply brief and afforded the other parties the same opportunity. I received a reply brief from the Respondent.

<sup>8</sup> On November 25, 1979, the Charging Party filed a motion to reconvene the hearing and admit new evidence and testimony. By Order dated December 14, 1979, I denied the motion. On November 23, 1980, the Charging Party filed a similar motion. Both the Respondent and counsel for the General Counsel filed motions in opposition to reopening the hearing. The Charging Party's motion is hereby denied.

## III. THE UNFAIR LABOR PRACTICES

## A. Background

William L. Ball was admitted to membership in Local 26 sometime in 1970. It is evident from the record herein and the Board's Decision and Order and the Administrative Law Judge's Decision in Case 3-CB-2260 (*The Buffalo Newspaper Guild, Local 26, American Newspaper Guild, AFL-CIO-CLC (Buffalo Courier-Express, Inc.)*, 220 NLRB 79 (1975)) herein referred to as the previous case, that almost from the date of his admission to membership, like a polar and nonpolar compound<sup>9</sup> Ball and the Local Union<sup>10</sup> could not mix. In the instant case, as in the previous one, a substantial part of the lengthy record was devoted to background evidence for the purpose of establishing animus against Ball, and his conduct which precipitated such animus by the Respondent. For the purpose of deciding the ultimate issue in this case, i.e., Ball's expulsion from the Union with the accompanying assessment of fines and a reprimand, such background is totally unnecessary. For each of the Respondent's officers and/or agents who testified in this proceeding readily admitted, or tacitly admitted, a resentment toward Ball for many of his various activities and the manner in which he went about his endeavors to strictly enforce the collective-bargaining agreement between the Union and the Employer and obtaining adherence to the Union's constitution and bylaws.

In the presence case, the Administrative Law Judge alluded to Ball's endeavors in this regard as his "zealous involvement" in union affairs. By the time of the events giving rise to the issues litigated here, Ball's "zealous involvement" had become an obsession with him.

Prior to briefly addressing the background evidence presented for the purpose of showing animus by the Respondent's Local as presented herein and as found in the previous case, it may be helpful to briefly describe the structure and composition of Local 26. At times relevant herein the Respondent's Local represented approximately 550 employees, primarily editorial department employees, of three newspapers operating in the area of Buffalo, New York, viz, The Courier-Express (the Employer herein involved, hereafter referred to as the C-E Unit, The Buffalo Evening News, hereafter referred to as the BEN Unit and the Tonawanda Evening News, hereafter referred to as the TEN Unit). The employees of each of the three Employers comprise a separate appropriate bargaining unit and each unit has its own unit officers and grievance committees and chairmen. The C-E Unit, of which Ball was a member, had almost 300 employees in the unit.

As relevant here, Richard Roth was at times president or vice president and a member of the executive committee of the Local. John R. Fleming, Jr., was grievance committeeman and a member of the Local executive committee. John Wilhelm was unit chairperson of the Respondent's Local and Joe Ritz was an executive committee member of the Local as was Henry Locke who

was also a member of the negotiating committee and the grievance committee and vice chairman of the C-E Unit. Richard Beer was a member of the executive committee. Patrick Ryan was a member of the executive committee and a member of the standing committee. David Stout was secretary of the Local Union. Paul MacClennan was president and a member of the executive committee. Raymond Hill was a member of the executive committee, parliamentarian, and chairman of the BEN Unit. Robert Buyers was chairman of the trial board of the union charges brought against Ball (May 25-July 2, 1976) and Richard Batzer was a member of the executive committee, the negotiating committee, and a member of the grievance committee. Various other members are alleged herein, and admitted, to be agents of the Union, such as the individuals filing the internal union charges against Ball and those constituting the trial board as well as the prosecutors of the three charges upon which Ball was tried.

The Administrative Law Judge in the previous case did not set forth "each and every incident, activity, or conversation tending to establish such animus" against Ball that was presented to him in that proceeding, however, he did address a number of such allegations and in order to get a total perspective of the instant issues it is necessary to briefly review the incidents addressed by him there as well as the Board's findings of unfair labor practices against Ball. In April 1973, Ball ran against Patrick Ryan for chairman of the C-E Unit but was defeated in an election which was held on April 5, in which he was elected a delegate to the executive committee. Ball challenged the election to Local President Joseph Ritz in a letter dated April 18, 1973, explicating his reasons for challenging the election and specifically accusing James Rigby, a member of the grievance committee, of having engaged in irregularities. A committee of the Local was appointed to investigate Ball's complaint and as a result, at an April 26 meeting, voted to affirm the results of the election. Ball then appealed to the Union's national headquarters in Washington, D.C., by writing a letter to Charles Perlik, the president of the International, and enclosed a copy of his letter to Ritz. On July 2, Perlik advised Ball that the International lacked jurisdiction over the matter and suggested that he continue to pursue his protest through the Local Union. However, in August, Ball pursued his challenge to the April 5 election by writing a letter to the Secretary of Labor requesting that an investigation with respect to the election be conducted by that department and that the election be overturned. It is undisputed that as a result of that investigation the Labor Department advised the Local that unless it consented to a new election it would pursue the matter in court. The Local agreed to a new election which was subsequently conducted in which Ball again lost his bid for chairman of the C-E Unit to Ryan but was again elected to the executive committee. The irregularities found by the Labor Department are not set forth in the Administrative Law Judge's Decision.

Further, by way of background the Administrative Law Judge in the previous case found that on September 12, 1973, Ball requested John Fleming, then unit secre-

<sup>9</sup> For instance, oil and water, benzene and alcohol, etc.

<sup>10</sup> "The Local Union" as used here refers to the other members of the local and the duly elected officers thereof.

tary-treasurer to place him (Ball) on the grievance committee. In the absence of a specific denial by Ryan, the Administrative Law Judge credited Ball's testimony that Fleming at this point went on to say that Ryan told him he would not place Ball on the grievance committee because James Watson, the chairman of the committee, was opposed to him and that Ryan had stated that if he (Ryan) had anything to do with it, Ball "would never hold any official position in the Union."

The Administrative Law Judge also found by way of background that in July 1973, Ball filed a charge against the Respondent with the Board in Case 3-CB-2107 alleging a violation of Section 8(b)(1)(A) based upon the Respondent's refusal to process a grievance filed by him in December 1972. In connection therewith, the grievance committee chairman, Watson, testified that his relationship with Ball was "strained" and placed the beginning of this relationship about the time of the filing of the charge. Watson further testified that he felt that Ball was trying to give him a "fast shuffle" and that he did not trust him. In addition thereto, the Administrative Law Judge in the previous case noted that in a February or March 1973 meeting with Ryan, Watson, Rigby, and Wetmore, Ball openly accused union officials of selling out to management concerning nonguild members performing work required to be performed by guild members. In November 1973, Ball again challenged the procedure of the Respondent's officials in appointing a negotiating committee to participate in contract negotiations which challenge was denied by the Local, and the International, on appeal, stated that they were without jurisdiction in this matter.

It appears that there were a minimum of three internal union elections each year in which the C-E Unit was involved: the election of Local 26 officers; the election of the C-E Unit officers, and an election for delegates to the national convention. It appears that after Ball's initial success of having the April 5, 1973, election overturned, he challenged essentially every subsequent election. However, the record does not establish the basis for his challenges or how far he pursued them. It should be noted however that no other elections were overturned. In the previous case the Administrative Law Judge and the Board found that the Respondent violated Section 8(b)(1)(A) when its executive committee member, Ritz, threatened to bring Ball up on charges and have him expelled from union membership if he continued his protest against the Respondent with the FBI and the Department of Labor, and the Respondent's threat to bring intraunion charges against Ball because he filed the unfair labor practice charge in the previous proceeding. The Administrative Law Judge and the Board also found that the Respondent violated Section 8(b)(1)(A) by its failure to process three grievances designated as "the assistant slot man grievance," "the days off grievance," and "the part-time editor grievance." The Board, reversing the Administrative Law Judge's Decision, found that six additional grievances filed by Ball should be processed by the Union and the failure of the Union to do so violated Section 8(b)(1)(A). Accordingly, it ordered the Respondent to cease and desist from the 8(b)(1)(A) activity found therein and to process the nine grievances designated

therein. However, the Administrative Law Judge and the Board dismissed two 8(b)(1)(A) allegations of coercion alleged in that complaint; one by discrediting Ball's testimony concerning the "gun incident" and, although crediting Ball in another regard, found that the evidence did not support the 8(b)(1)(A) allegations and that the General Counsel had failed to establish that the Respondent had warned employees not to associate with or speak to Ball.

The instant case is essentially a continuation of the previous case. The Board's Decision in that case issued September 3, 1975, and the first charge filed by Ball in the consolidated cases before me, 3-CB-2678, was filed February 11, 1976. Thus, there is little evidence in this record presented by way of background since most of the evidence pertains to allegations of the complaint.

#### *B. General Credibility Resolutions and Disposition of Some Complaint Allegations*

As heretofore noted, the primary issue in this case involves the expulsion and fining of William L. Ball by the Union in May 1976. In his contention that this action was unlawful, the General Counsel relies in substantial part upon what he terms "union animus" toward Ball as demonstrated by the background and findings in the previous case and the alleged threats of coercion and reprisals alleged in the instant case. I have set forth above the findings of the Board in the previous case which demonstrates that at least many of the local union officers, and perhaps members, have a great deal of resentment against Ball for what the administrative law judge there called his "zealous" enforcement of the collective-bargaining agreement.

In support of the complaint allegations herein, the General Counsel relies upon the testimony of three witnesses and voluminous documentary evidence. The General Counsel's witnesses were: Charging Party William L. Ball, who testified for several days and several hundred pages of testimony; Kenneth W. Kostolecki, who also gave voluminous testimony, some of which involved issues raised by charges he had filed and which were subsequently settled; and Nora Harden, who gave testimony concerning several conversations with the Respondent's admitted agent, Henry Locke, between March 1977 and March 1978 in which Locke allegedly threatened her and made a number of statements demonstrating the Respondent's animus toward William Ball.

It is well settled that the burden of proof is upon the General Counsel to persuade the administrative law judge of the credibility of his witnesses over those witnesses testifying differently, and when he fails to do so he has failed to meet the burden of proof.<sup>11</sup>

Turning first to Nora Harden whose testimony related to allegations solely against the Respondent's agent, Henry Locke, as set forth in Case 3-CB-3182 as amended by the General Counsel on October 28, 1978. Shortly

<sup>11</sup> Administrative Procedures Act 5 U.S.C. § 556(d) and 706(2)(e); *Consolidated Edison Co. of New York, Inc. v. N.L.R.B.*, 305 U.S. 197, 229, 230 (1938); *Willapa Oysters v. Ewing*, 174 F.2d 676, 690, 691 (9th Cir. 1949); and *N.L.R.B. v. Bell Oil & Gas Co.*, 98 F.2d 406, 410 (5th Cir. 1938). Compare also *Blue Flash Express Inc.*, 109 NLRB 591, 592 (1954).

after Harden became employed in the library at the Courier Express, she and Henry Locke, the record clearly discloses, became "good friends," during the course of which she rode home from work with him on many occasions as well as having dinner and drinks with him. It is during the course of this relationship that Harden testified that Locke made several remarks to her herein alleged to violate Section 8(b)(1)(A).

It is equally obvious from the record that some time during the fall of 1977, the relationship between Harden and Locke became strained and was apparently terminated. I am convinced by the testimony of Locke and the conduct of Harden toward Locke, as testified to by other witnesses, some of which is admitted by Harden, that it was Locke who severed the relationship. Be that as it may, it was evident from Harden's testimony that, at the time of the hearing, she bore a great deal of animosity toward Locke. It is equally evident that Harden was a very reluctant witness for the General Counsel. She did not appear pursuant to a subpoena on the first day that she was scheduled to testify and it appears that counsel for the General Counsel had a great deal of difficulty in obtaining her appearance for the hearing. In any event, her demeanor on the stand and her overall testimony, including some implausible explanations for actions which she admittedly had taken, convinces me that Harden is not a reliable witness.

On the other hand, Locke impressed me as a generally credible and straightforward witness in his testimony, in detail, about their relationship and his denial of the allegations made by Harden. While the issue is not free from doubt, that is the confidentiality of the relationship during May to July 1977, Locke conceivably could have made some of the comments alleged by Harden in the belief that they would remain forever confidential. However, as noted, Harden's obvious animosity toward Locke and her testimonial demeanor persuades me that her testimony in that regard is unreliable and, accordingly, I do not credit her.

Harden testified that during this period of time Locke discussed Ball with her on many occasions and advised her that Ball had been "blackballed" from the Union and admonished her not to associate with him or she could get into "serious trouble" or possibly get thrown out from the Union and lose her job at the Courier Express. According to Harden, Locke also admonished her not to associate with several other employees who were supposed to be friendly toward Ball or there was a possibility of the same consequences. During the course of these same conversations, Harden alleged that Locke told her that Ball filed "crazy charges" and was a "sicky" and made trouble for the Courier Express and the Union. That he further referred to Kenneth Kostolecki as a "sicky" who filed many charges and who was never going to get a job with any newspaper in the country.

Locke testified with respect thereto that while he associated with Harden on a social basis and drove her home on a number of occasions that he never admonished her not to speak with or associate with any other employees. He admitted, however, that he identified various employees for her since she was new at the Courier Express. Harden further testified that sometime in July, in the

lunchroom at the Employer, Locke discussed the grievance of Mickey Osterreicher with her and another employee and stated that Osterreicher would not win his grievance, presumably because of his association with Ball, or the fact that Ball had filed the grievance on his behalf. In the same conversation, it appears, that Locke also told her that she had no chance for advancement to the position of reporter at the Courier Express if she associated with Ball.

Locke denied ever discussing the grievance with Harden on any occasion and specifically in the lunchroom and he further denied that he had ever told her that she would not make reporter by speaking to, or associating with Ball.

There was apparently a hiatus in Locke's association with Harden, at least any comments relating to Ball or alleged in the complaint, until about March 15, 1978, when, according to Harden, Locke came to her new apartment to drop off some packages that she had left at work. She testified that "out of the clear blue sky" Locke asked her if she talked to Bill Ball. Harden apparently declined to answer, at which time Locke allegedly offered her a position on the Human Rights Committee of Local 26. Upon her inquiry as to whether that was the committee that was out to get Bill Ball, Locke replied "you're right."

Locke recalled that at some point he took some packages to Harden's apartment which she had left at work and was invited in to see her "new apartment." He testified that she did not mention Ball or his filing of charges and neither did he. Locke stated that it was possible that he asked her to serve on the Human Rights Committee but that he had never followed up on it, and denied stating that the committee was out to get Ball.

The next and final allegation relating to Locke occurred approximately July 19, 1978, at which time Harden testified that while she was on a pay phone at the office, Locke walked by her and said "I will see that you get beat yet." This out of the clear blue sky also and there is no testimony of any further exchange on that occasion. Locke denied the statement.

In order to establish the coerciveness of this last, ostensibly innocuous remark to Harden, the General Counsel produced some testimony concerning the fact that Harden had been attacked by the prior occupant of her apartment about March 31, 1978, and was out of work until May. According to Harden, her assailant had told her that he was a friend of Locke's and she testified that Locke admitted this fact to her. Locke denies knowing, or being acquainted with, Harden's assailant. According to Harden, when she returned to work, Locke called her a liar for telling everyone that he knew the assailant.

As noted above, I am persuaded by Locke's testimony that he made no such coercive remarks to Harden.

Although, already having discredited Harden, it should be noted that after the termination of their relationship, according to Wilson McCutcheon, a coemployee of Harden in the library, when Harden returned to work after her assault she told him that she had been assaulted by a man that Locke knew and who was his

friend. He further testified that on more than one occasion he observed her dial Locke's extension and, apparently when he answered, hang up. McCutcheon also testified that prior to the assault he had observed and heard her call Locke and in the course of the conversation use such words as "bullshit," "M-F," and he had heard her use similar language to Locke face-to-face, including calling Locke a burrhead. Locke testified that as a result of their severed relationship and Harden's harassment of him at home he had his home telephone number changed. Harden does not deny making some of the harassing telephone calls to Locke.

In short, as noted above, while credibility resolutions such as those raised here are seldom free from some doubt, I am persuaded that the General Counsel has failed to establish that Harden's testimony is credible in view of her evident personal animosity toward Locke. It should be noted that there are no other allegations pertaining to Locke, who appeared to be a rather low-keyed individual, and was a member of the grievance committee and perhaps on the executive board of the C-E Unit. Accordingly, I find and conclude that the General Counsel has failed to establish the allegations of the complaint relied upon by the testimony of Harden and which relates to 8(b)(1)(A) violations committed by Henry Locke. I recommend that the consolidated complaint be dismissed with respect thereto.

Next is to consider the reliability of the testimony of Kenneth W. Kostolecki. Kostolecki was hired as a copy editor by the Courier Express and started work on January 5, 1976. His employment terminated on March 7, 1976. It appears, and I find, that at the time Kostolecki was hired he was told by slot man, Bert Nelson, who had interviewed him, that his employment would be about 8 weeks. It appears that he was hired as a "vacation" replacement for William Ball who was going to be hospitalized for a couple of months. Although Kostolecki was not satisfied with the rate of pay he received in his first paycheck, and alleges in his testimony that Nelson had told him that it would be in the neighborhood of \$400 per week, no grievances were filed over the rate of pay until after Kostolecki's termination on March 7, 1976.

As heretofore indicated, upon Kostolecki's termination, he filed several 8(b)(1)(A) charges against the Respondent Unions herein as well as three other local unions in western New York and against several employers. All such allegations and complaint issues were settled during the course of, and after, the hearing herein.

Many of the complaint allegations upon which the General Counsel relies rests on the testimony of Kostolecki and occurred during the April 8, 1976, union meeting wherein delegates to the national convention were being nominated, and which meeting resulted in internal union charges being filed against William Ball. Thus, the specific allegations will be dealt with in the section of this Decision wherein it is considered. While many of the complaint allegations supported only by Kostolecki's testimony were subject to corroboration, the General Counsel offered no corroboration, and indeed much of his testimony relating thereto was denied or inferentially refuted

not only by the Respondent officers, but by "presumed" friends of Ball and Kostolecki.

Kostolecki was not an impressive and believable witness. Not only with respect to his testimony pertaining to the remaining complaint allegations but with respect to the testimony that he gave in support of the charges involving himself and the local union as well as other locals and other employers. Much of Kostolecki's testimony, particularly pertaining to the complaint allegations herein, was general in nature and frequently on cross-examination he would testify in direct contradiction to his direct examination. For instance, with respect to the April 8 meeting, Kostolecki testified that only four or five names of the nominees which Ball had submitted for nomination had been read before certain officers of the Union made threats to bring charges against the reader of the names as well as Ball and have him thrown out of the Union. This is in conflict with other credited testimony that perhaps as many as 10 to 20 of the names had been read before an objection was raised thereto. On cross-examination, Kostolecki testified that several of the individuals which Ball had submitted into nomination immediately requested that they be withdrawn. Thus, it is evident that more than four or five names were read in order for "several" nominees to request that their names be withdrawn.

Similarly in other respects, Kostolecki testified in conflict with, or gave testimony not set forth in previous affidavits given to the Board. For instance, he testified that at the time of his hire, Nelson had stated that his salary would be in the neighborhood of \$400 per week. However, this is not in his pretrial affidavit taken some 3 months later, and on cross-examination Kostolecki admitted that he just "assumed" that he would be paid in accordance with the contract. At the hearing he also testified that at the time of his hire nothing was said to him that would indicate that he was a temporary employee.

At the hearing Kostolecki testified that he was never told that his job was temporary or given an indication that it was anything other than full time. When confronted with a pretrial affidavit given some 3 months after the event and wherein he wrote, "at the time I was hired . . . I was never told that I would be hired as a temporary employee but was told my job was eight weeks to replace someone who was in the hospital," he admitted that he read the affidavit and indeed made a number of changes in the affidavit which were initialed. In attempting to explain away the apparent conflict between his trial testimony and his pretrial testimony, Kostolecki stated that he told the Board agent taking the affidavit at the time that that portion of the affidavit was inaccurate and requested that it be changed. He testified he told the agent that it should read "that he was asked to assure the company that he would stay at least eight weeks and then he replied that he would stay eight years if possible." Kostolecki testified that he specifically asked the Board agent to change that portion of the paragraph and was told that "it wasn't important." He testified that on two other occasions he went to the Board's Office and

requested to change that portion of his affidavit and the request was denied.<sup>12</sup>

Considering the purposes for which this affidavit was apparently taken and the critical nature of the statement to which Kostolecki testified that he objected, I am unable to believe that the Board agent would not permit him to change the quoted portion, or at any rate, to file a supplemental affidavit in which he could explain the apparent conflict.

Considering the foregoing, and Kostolecki's demeanor on the witness stand including his evasive and equivocal answers and sometimes conflicting testimony, I must again conclude that the General Counsel has not borne his burden of persuasion that this witness' testimony is credible. Thus, where Kostolecki's testimony is credibly denied or refuted by documented evidence, I shall not credit him.

Turning now to the General Counsel's major witness, the Charging Party William L. Ball, and a consideration of the basis of his credibility. First, after observing Ball's demeanor on the witness stand for several days and several hundred pages of testimony spanning approximately a 5-year period, I am convinced, contrary to the Respondent counsel's argument in brief, that Ball is basically an honest and honorable man. It should be noted that in the preceding case the Administrative Law Judge, at footnote 3 therein, remarked upon Ball's "remarkable memory for details and dates as to the various incidents and matters concerning which he testified." He also observed that many of these Ball had documented at the time of the occurrence and on the whole he appeared to be a credible witness. However, it should further be noted that it appears that Ball's testimony in that proceeding was credited only when it was corroborated by other testimony or documentary evidence. For instance, the Administrative Law Judge did not credit Ball in his allegation that at one point in time, in a local restaurant, Patrick Ryan pulled a gun, held it in his right hand, and made popping noises at Ball. In so concluding, however, the Administrative Law Judge at footnote 9 therein stated that he did not find that Ball deliberately fabricated his testimony and since the event occurred at night, Ball might have "envisioned" the gun.

In another regard in that case while the Administrative Law Judge credited Ball's testimony over that of the Respondent's Executive Committee Member, Joseph Higgins, that Higgins made the statement to Ball that "he could see himself obtaining a Norden bomb sight and flying over my home," the Administrative Law Judge and the Board found that the remark could not seriously be construed as a threat of bodily harm and accordingly dismissed the allegation.

With regard to another incident, although Ball's testimony was credited, the Administrative Law Judge found that the statement allegedly made by copy editor Toronto, that he told the editorial copy staff that they had been approached by Ryan and Watson who told them not to associate or talk with Ball or he would get them

in trouble with the Labor Department, the statement was not denied by Toronto. However, the Administrative Law Judge found that it did not constitute a violation of the Act in and of itself.

In the previous case, the Administrative Law Judge noted that Ball had a "zealous" involvement in other union affairs, such as allegations that the Respondent's officials did not strictly enforce or correctly interpret the provisions of the collective-bargaining agreement between the Company and the Union as well as charges that the Respondent's officials engaged in various other improprieties in handling the internal union affairs, as a result of which many union officials may well have resented Ball's involvement in the Union and the manner in which he endeavored to correct what he perceived to be improprieties by the Union in the administration of the contract.

As might be expected from the lengthy testimony given by Ball concerning numerous incidents and conversations spanning a 5-year period, there are a great many conflicts, inconsistencies, and variances in his testimony. His testimony on direct examination with respect to the many events and conversations to which he testified was given in a manner indicating no uncertainty on his part as to the dates, places, and others present and the content of what was said. While his memory could be jogged with respect to certain events and incidents by the many written documents which the General Counsel submitted into evidence as exhibits through Ball, it appeared that Ball did indeed have a remarkable memory with respect to dates, places, and the presence of others at the many conversations, some of which are here alleged to constitute violations of Section 8(b)(1).

However, under adroit and searching cross-examination, Ball's recollection of dates, places, others present, the contents of the conversations to which he testified, and the entire sequence of events became less certain and extremely evasive. Some of this testimony was similarly at variance with pretrial affidavits which he had submitted to the Regional Office of the Board in preparation for these cases. It is when Ball was confronted with this and other documentary or irrefutable evidence in conflict with his direct testimony that his memory became selective and vague as to precisely what had occurred.

A couple of examples will suffice for the purposes of this section of the Decision. For instance, on direct examination, Ball testified that he received a letter from Richard Roth, president of the Buffalo Newspaper Guild, Local 26 on April 6, 1977.<sup>13</sup> Roth's April 6 letter dealt with the Union's handling of a part-time grievance and was in response to an earlier letter from Ball with reference thereto. Ball testified that immediately upon receipt of this letter he telephoned Roth and advised Roth that he had checked the "Frontier Reporter"<sup>14</sup> and could find no evidence of the grievance having been considered, and requested that Roth furnish him whatever documentation existing which demonstrated that the grievance had been considered. On April 11, Ball replied

<sup>12</sup> This affidavit was apparently given primarily in support of Kostolecki's 8(a)(1) and (3) charges against the Courier Express alleging that his termination on March 7 was because of his union or protected concerted activities.

<sup>13</sup> It appears based upon the date of the certified mail receipt of the letter signed by Ball's wife that he actually received the letter on April 7.

<sup>14</sup> A monthly publication of Local 26.

to Roth's April 6 letter contending that disposition of the grievances had not been obtained. In Ball's April 11 letter, he did not allude to any telephone call to Roth.

On cross-examination, Ball stated that he did not recall the exact date of his telephone call to Roth but that it was sometime between receipt of Roth's April 6 letter and Ball's April 11 letter. On further cross-examination, Ball stated that he did not know if it was the day he read Roth's letter or the following day, but testified that his call to Roth was made at approximately 1 p.m. and he did not know where Roth was at the time, but was either at home, the union office, or the Courier Express. On further cross-examination, Ball conceded that his memory was poor and that he did not recall the exact date but again reaffirmed that it was between April 6 and 12. Upon still further examination concerning this matter, Ball conceded that he could not recall how he and Roth made contact, whether he called Roth or Roth called him, which is contrary to Ball's prior affidavit and his prior testimony.

However, during the course of this alleged telephone conversation, Ball alleged that Roth replied that Ball would not be represented by the Union because of his complaint with the Federal and state agencies and because he was not a union member. When further questioned concerning the telephone call, which Roth was to deny in its entirety, Ball stated that he really could not recall the sequence in which the events occurred and declined to attempt to recall the exact date he composed his April 11 letter to Roth.

As noted, Roth testified that he had never been called by Ball on the telephone and that he had never telephoned Ball himself. He testified that from approximately 8 a.m. on April 7 to 5 or 6:30 p.m. on April 13 he was not in Buffalo but was instead on vacation with his family and father-in-law and did not arrive back in Buffalo until about 6:30 p.m. on April 13. He also denied that he had any telephone conversation with Ball while on vacation.

The employment relations manager of the Courier Express produced the timecard of Richard Roth which showed him on vacation from April 7 through April 14, and he testified to that effect.

At the hearing, the Respondent's counsel suggested that during a recess Ball had contacted the Courier Express and learned that Roth had been on vacation during this period of time and became evasive as to the telephone call after that time.

Another example of Ball's evasiveness under searching cross-examination, confronted with his own writings, Ball testified that, subsequent to a nominating convention in May 1975, he was told that the office secretary had told his nominees "the troublemaker has put your name on the list again." He named one employee, Jim McAvey, as being one who told him this; however, McAvey testified that the office secretary, Victoria Dragem, had called him at home and merely told him he had been nominated for an executive committee member position as had a great many other people and asked if he had any desire to run. McAvey testified that he did not know who had nominated him. In a letter dated May 9, 1975, to Local President MacClennan, largely protest-

ing the minutes of the local meeting for May 1975, Ball charged that his nominees had been badgered off the election roster by Office Manager Victoria Dragem, who he later referred to in the letter, as the office lackie. At the hearing Ball testified that he had never called Dragem the office lackie and that he had no idea as to whom he had made reference when he used the term in the letter to MacClennan. It was after confrontation with this letter that Ball made the concession that he did not know who had contacted the nominees he had submitted into nomination and indeed whether or not they had been badgered off the list.

As heretofore noted, by the time the events giving rise to the instant proceeding, Ball's zealous involvement in union affairs had clearly become an intense obsession with him. Demonstrative of this fact, in addition to Ball's testimony, are the numerous letters received into evidence as exhibits offered by both the Respondent Union and the General Counsel, demonstrating Ball's objection to essentially every action taken by the local union whether it be in connection with the minutes of its monthly local meetings or challenges to the various elections in which the C-E unit participated.

Indicative of Ball's intense subjective concept of how the Union should be operated and indicative of his conviction that only when matters pertaining to the Union were resolved to Ball's individual satisfaction was any matter, in his opinion, disposed of properly.

For instance, by letter dated November 18, 1974, to Patricia Swift, secretary of Local 26, Buffalo Newspaper Guild, Ball requested that the letter be placed in the records of the local and thereafter attacked the authenticity of the minutes of the last meeting. Ball submitted, in all seriousness, a claim for \$200,000 in settlement, for "the activities of officers, agents and employees of the Buffalo Newspaper Guild have had the effect of causing me and my family extreme mental anguish. These actions have caused me loss of present and future income and virtually foreclosed any possibility without or within my profession. These actions have interfered with my constitutional guarantees against loss of life, liberty and pursuit of happiness without due process of law."

Again, in a letter dated June 9, 1975, to MacClennan, as president of Local 26, Ball again attacked the veracity of the minutes of the June 1975 union meeting as reported in the "Frontier Reporter." Ball made certain remarks concerning Dave Stout, secretary of the Local, and presumably the individual charged with the preparation of the minutes, concerning the marital status of Stout and his wife. At one point, on the third page of the letter, Ball states "Mr. & Mrs. Dave Stout—I presume that the Stouts are man and wife." Next to the last paragraph of the letter Ball states:

For the record, I also ask that Mrs. Stout and David Stout, if they are man and wife, be asked if they will formally agree to waive any right to testify against one another in any legal forum relating to their activities as officers and agents of Local 26; or if they reserve the right to take refuge within the principle of *espouseoso nonsquealus*.

Ball then asked that the entire letter be read at the next meeting. The record reflect no basis for Ball to obliquely question the marital relationship of the Stouts, but is indicative of the vindictiveness with which he expressed his objection to the manner in which the Union's business, through its officers and members, was being conducted, and, if not indicative of irrational behavior, certainly is indicative of an intensively subjective bitterness toward the Union.

Further indicative of Ball's intensively subjective concern with having the business of the Union conducted in a manner acceptable only to him is his testimony at the hearing concerning the processing of 30 to 40 grievances during the period of time that he was grievance chairman for the C-E unit. On direct and cross-examination, Ball repeatedly testified that none of the 30 to 40 grievances, then pending, had been handled. However, upon examination by the Administrative Law Judge as to just what status or position the grievances were in, Ball conceded that they had been disposed of at the first or second step of the grievance procedure, but, since they had not been disposed of to Ball's satisfaction, with the exception of one, in his opinion they were still pending grievances.

One could go on and on with specific examples of Ball's attitude toward the officers of the Local Union and his insistence that although they were, by and large, elected officials, consistently refused to, and declined to enforce the terms of the collective-bargaining agreement. This clearly reveals, as perceived by Ball, that they must be disposed of to Ball's individual satisfaction.

There is no doubt in my mind that after the prior case before the Board and Ball's success in having the 1974 election overturned by the Department of Labor, Ball was convinced that thereafter the union officers would not represent him as a union member in retaliation for his having filed such charges. Accordingly, I believe Ball became so obsessed with this conviction that it tainted his entire testimony relating to the events occurring in the instant case.

Perhaps one further example of Ball's methods utilized to achieve what I am convinced he perceived as a desirable solution to problems that he perceived to exist, arises out of the preparation of certain self-serving documents purporting to give him the authority to file charges on behalf of the Union with various state and Federal agencies. It is undisputed, and Ball does not deny, that under the Union's constitution and bylaws, only the local union could authorize the filing of charges on behalf of the Union with Federal or state agencies. This is certainly understandable in view of the fact that such charges filed by individuals in the name of the Union might conceivably incur expenses upon the Union and in the event the charges were established to be frivolous could actually incur the cost of legal expenses for the employer having to defend them. See, for instance, *Ekanem v. Health Hospital Corp. of Marion County*, 589 F.2d 316 (7th Cir. 1978).

It appears that at a November 8, 1975, union meeting, during the period of time Ball was C-E grievance chairman, some discussion arose concerning the environmental working conditions of some of the editorial depart-

ment employees at the Courier Express and that a motion made by member Cliff Preisigke and seconded by Lynn Delmar that the C-E unit grievance committee be permitted to check with governmental agencies as to what protection guild members had with respect to such environmental working conditions was passed. On the witness stand Ball admitted remembering the passage of the environmental working conditions motion but also stated that he presented the following motion that was passed:

Moved, that William L. Ball grievance committee chairman of the Buffalo Courier Express unit, Buffalo Newspaper Guild, Local 26 is directed to proceed through the normal grievance and administrative procedures and channels and to take action by any and all appropriate city, county, state and federal agencies and bodies to enforce the collective bargaining agreement and resolve problems related to the working conditions between the Buffalo Courier Express and the Buffalo Newspaper Guild.

The minutes of that meeting, while reflecting the passage of the motion involving the environmental working conditions, do not disclose that Ball's alleged motion was made or passed. Several other members in attendance at the November 8 meeting: John Fleming, Lynn Delmar, Cliff Preisigke, and Robert Litzenberger, who presided over the meeting, testified that no such broad motion was made by Ball or that it was passed, and denied that they had ever seen what was admitted into evidence as General Counsel's Exhibit 6(a).

According to Ball, on November 10, 1975, he prepared a memo to the membership asserting in substance that at the November 8, 1975, meeting he was appointed by the membership to pursue the problem of the environmental conditions present in working spaces to which members of the collective-bargaining unit are assigned. Ball went on to state in this memo that it included not only problems dealing with air space and floor space occupied by members but included the conditions applicable throughout the Courier Express where it involved members of the work force covered by the collective-bargaining agreement including the conditions of the motor vehicles—heaters, etc. He asserts in the alleged memo:

The membership instructed me to proceed through the normal grievance and administrative procedures and channels and to seek action by any and all appropriate city, county, state and federal agencies and bodies.

This would include but not be limited to the various Department of Labor, Wage and Hour Division, Labor-Management Relations Divisions, and Occupational Health and Safety Administration offices and agencies.

He then invited any interested member to make suggestions.

Also on November 10, Ball allegedly prepared another notice to the membership, according to him, because he

noted that it needed some rewriting and editing and to show that copies of the notice had been sent to Paul MacClennan, John Fleming, and Willard Hatch.

However, a comparison of the two asserted notices to the membership reflect that they concentrate on totally different elements of working conditions and with respect to the agencies Ball was allegedly authorized to contact. He asserts:

Among the agencies involved in this action are the State Human Rights Division and the U.S. Equal Employment Opportunity Commission. These agencies can help us in rectifying the problems involving discriminatory practices as they relate to minority group members and women. By using the processes of these agencies we can avoid the cost of arbitration and discrimination cases.

As in the case of the complaints to the Occupational Safety and Health Administration and the possible use of the state labor department, the membership directed me to proceed through grievance channels and if these processes are unsuccessful to proceed through the various agencies involved.

If any member feels that he has been discriminated against or is being discriminated against because of sex, age, race, national origin and so forth, please contact the undersigned. I have been assured by the agencies involved that persons can, if they so desire keep their names confidential and that any person giving testimony or information are protected by law from reprisals.

Ball's testimony regarding the preparation of these asserted documents and what he did with them is to say the least ambiguous. He testified on cross-examination that, although he prepared the second document before posting the first, it does not make reference to EEOC or elicit complaints concerning discrimination under their jurisdiction, and the second was evidently prepared to correct this omission. On cross-examination, Ball testified that he also posted the second notice on the bulletin board as well as the first. However, on recross-examination, Ball admits that the second notice prepared, General Counsel's Exhibit 8, was never posted.

Although one of the reasons asserted by Ball for the preparation of the second notice to employees was to reflect that copies of it had been served on certain individuals, he testified that he left a copy of General Counsel's Exhibit 7, i.e., the first notice for John Fleming, in the intra office mail. With respect to the second notice, Ball conceded that "it may be that I never submitted that to Mr. Hatch" as indicated thereon. However, Ball testified that Hatch did not receive a copy of General Counsel's Exhibit 7 either. MacClennan, Fleming, and Hatch testified that they had never seen copies of this notice posted either on the bulletin board nor had they ever received any such documents through the mail or via intra office mail.

Additionally, by letter dated November 22, 1975 (G.C. Exh. 9), Ball allegedly forwarded to MacClennan copies of both General Counsel's Exhibits 7 and 8 which correspondence indicated that copies of that were also sent to

Willard Hatch and David Stout. In the November 22 letter to MacClennan, which MacClennan denies ever having received, Ball states *inter alia*:

I am asking herewith that these motions and notices be presented at the next regularly scheduled meeting of the Local 26 executive committee and membership that they be approved and endorsed. I also am herewith requesting that these documents be printed in their entirety and verbatim in the next published edition of the Frontier Reporter.

In addition, I am repeating my request for a definitive and authoritative statement by you or some other responsible officer on the formally adopted policy dealing with the processing of grievances and grievance issues and the duties and authority of the grievance committee, grievance committee chairman and the standing committee.

At the hearing, MacClennan searched his file and credibly testified that he had never received a copy of this purported document nor the attachments thereto.

Further, in an apparent effort to bolster a color of authority to deal with the outside agencies such as the Equal Employment Opportunity Commission, on January 3, 1976, Ball wrote to David Stout, secretary of Local 26, with respect to a grievance involving Debra Williams. After asking that the grievance filed on behalf of Williams be approved for arbitration, Ball stated:

That the undersigned, grievance chairman William L. Ball, be authorized to file a discrimination complaint on behalf of all minority groups at the Buffalo Courier-Express, such complaint to be submitted to the Equal Employment Opportunity Commission, the State's Human rights Division or any other state, federal or local agencies in power to receive such complaints.

I have laboriously read and reread several times Ball's testimony concerning *inter alia*, his actions and conduct described above and his sometimes imperceptible reasons for such conduct. I find and conclude that in Ball's zealous obsession with enforcing what he perceived to be the Union's obligation under the collective-bargaining agreement and its constitution and bylaws, by the documents purportedly prepared by Ball discussed immediately above, Ball endeavored to generate and expand upon what appears to be a general authorization to investigate various agencies that could perhaps be of assistance to the Union in solving certain perceived environmental problems as granted to him at the November 8 meeting, into an overall authorization to act on behalf of the Union with respect to any and all Federal and state governmental agencies, when, in Ball's opinion, such action was justified. I am further persuaded, that even assuming the above-discussed documents were prepared by Ball on the dates indicated thereon, that they were not posted or served upon the individuals indicated, and perhaps were even prepared as an afterthought, i.e., after Ball had filed the EEOC charge as hereafter discussed, for the purpose

of bestowing upon himself a color of authority to act for and on behalf of the Union in this respect.

In my view, Ball honestly felt that the ends that he sought to achieve for what he perceived to be the benefit of unit employees were justified by the means that he used. Although the record as a whole is abundantly clear that since 1973 Ball had strongly and vocally disagreed with the elected and appointed officers of the Union who were charged with the responsibility of administering the contract and had made that disagreement known through his voluminous correspondence with the Union and its officials, and as indicated above, at times in a manner approaching an irrational avenue of solution to the problems as he perceived them. I am further convinced that, in Ball's mind at least, since his successful charges against the Union in the previous NLRB case, as well as the overturning of the election, he was convinced that the union leadership would also retaliate against anyone friendly toward Ball, because of his zealous efforts to run the Union to his, Ball's, satisfaction. As a result of this obsession, albeit an honest and genuine belief by Ball, I am convinced that such mental attitude so colored Ball's testimony with respect to the realities of what transpired at the various meetings, conversations, and so forth alleged in the complaint to violate Section 8(b)(1)(A), that it can not be credited. As noted, in my view Ball was convinced that he would not receive fair representation nor would any grievance with which he was involved be processed, thus the several conversations relating to what was said to Ball at the time he presented a grievance concerning the fact that the grievance would not be processed, or that it would receive more favorable treatment were it filed by someone else, that the Union did not intend to represent Ball, that those who associated with Ball would receive the same treatment, and other such statements, were the result of Ball's transforming what he perceived the thoughts of the individual to be with regard to him into an oral statement to which he testified.

As clearly indicated above and by the record as a whole I think it might be fairly said that Ball conducted a one-man vendetta against what he termed the "intrenched leadership" of the Union. However, I find it inconceivable that counsel for the General Counsel could not obtain any corroboration for a vast majority of Ball's testimony where it is in apparent conflict with documentary evidence and or other credited testimony. As in the case of Kostolecki, it appears that not only the union officials, against whom Ball may have had a vendetta, but even "presumed" friends of Ball, were unable to corroborate him in many areas. In the second place, in my opinion the union officers and agents against whom Ball has made specific charges of 8(b)(1) conduct, assuming that such had been their thoughts at the time, would have been discrete in making statements to Ball, knowing his propensity for filing charges and his generally litigious nature.

However, as noted earlier a finding of the 8(b)(1)(A) conduct alleged in these consolidated complaints for the purpose of establishing resentment or animus against Ball by the Local is unnecessary to a resolution of the primary issues in this case; i.e., the expulsion, fining, and re-

primanding of Ball for the specific acts in which he engaged. I think it is abundantly clear from the record that because of Ball's manner and attitude in endeavoring to dictate the operations of the local union, particularly the C-E unit, that such resentment was evidently clear. Accordingly, except as it relates to the specific allegations of the complaint pertaining to Ball's internal union charges against him, his trial, and the verdict thereon, I believe that no useful purpose would be served in reiterating the specific allegations upon which the General Counsel relies on Ball's uncorroborated testimony.

As will be seen in the detailed discussion of the circumstances surrounding the conduct for which Ball was tried and convicted, the evidence germane to a resolution of the validity of such conduct is not in serious dispute.

In view of the conclusions reached above with respect to the general reliability of the General Counsel's three chief witnesses with respect to the testimony given in this proceeding, I do not perceive any purpose that would be served by setting forth the circumstances surrounding the numerous conversations with various Union officials to which these witnesses testified. As I understand the General Counsel's theory of the case, this testimony was offered principally for the purpose of establishing that the officers of Local 26, as well as perhaps some members of Local 26, held a great deal of animosity against Ball for his Section 7 or concerted protected endeavors to obtain strict adherence to the collective-bargaining agreement and the national constitution and bylaws. This testimony dealt largely with alleged threats of reprisals against various union members for associating with Ball; refusing to properly process grievances filed by Ball or by individuals friendly with Ball; admonitions to employees of adverse reprisals for associating with Ball; and threats of reprisals including expulsions and fines for association with Ball or support of him.

To the extent that such animus might be a factor in the determination of whether or not the bringing of internal union charges against Ball for his having filed the UC petition; a complaint with the EEOC against the Courier Express, as a representative of the Union; and his having attempted to introduce into nomination 208 names for seven positions to the national convention and his subsequent trial and conviction of all three counts violated Section 8(b)(1)(A), I have no problem, based upon the findings in the preceding case as well as the tacit admissions by some of the officers and members of the Local who testified in this case, that they bore a great deal of resentment and animosity toward Ball for his intensive, subjective, and obsessive involvement in intraunion affairs. The voluminous files in this case are replete with copies of correspondence from Ball to the Union and from the Union to Ball, as well as additional credited testimony of record, including that of Ball, establishing further activity by Ball, wherein it appears that he objected to essentially every act of the Local, particularly the Courier Express unit. It also appears that he objected strenuously to any inaction by these parties.

It is axiomatic that Ball, as well as any other union member, has a Section 7 protected right to express dis-

satisfaction with actions of the elected union leaders and to dissent therefrom and urge others to join him in his views. Needless to say, it takes little imagination to picture the chaos that would reign in the orderly procedure of business including the administration of the collective-bargaining agreement if each of the 550 union members expressed the same intense persistence as did Ball with respect to having all issues resolved to his/her own personal satisfaction.

I shall now turn to consideration of the primary issues in this case, i.e., whether Local 26 violated Section 8(b)(1)(A) when it filed internal union charges against Ball on three separate counts; tried him on each of the separate three counts; and arrived at a conviction including expulsion and fines on each of the three counts,<sup>15</sup> and whether the Newspaper Guild, AFL-CIO, CLC, violated the same sections of the Act in upholding in substance the findings, conclusions, and convictions of the trial board and the disciplinary action imposed by them.

In view of the fact that separate internal union charges were filed against Ball on each of the three counts indicated; that he was tried separately by the trial board on each of the counts; and the trial board made findings and conclusions with respect to each of the counts, I shall deal with them in that manner here.

#### C. The UC Petition—3-UC-105

There is no material dispute in the testimony or evidence concerning the facts leading up to Ball's filing of the unit clarification petition docketed as Case 3-UC-105 on March 10, 1976, seeking, in essence, to have all employees bearing a classification of A and B removed from the unit.<sup>16</sup> It is established that as early as 1973 Ball came to the personal conclusion that these classifications were supervisory and thus those employees should be excluded from the unit and more specifically should not be permitted to hold an office with the Local or the C-E unit. While Ball's petition dealt only with the Buffalo Courier Express, it is evident from Respondent Local's argument that it feared the import of success of such petition would similarly affect the BNG unit and TNG unit. In 1973 Ball attempted to file a UC petition with the Board's Region 3, in Buffalo, New York, and was advised that in accordance with Section 102.60(b) of the Board's Rules and Regulations, as amended, he did not have the authority to do so since that section provided that such petition "may be filed by a labor organization or by an employer."

Having thus failed, Ball then sought to have the Local or the C-E unit chairman file such a petition, which suggestion was rejected. Ball then attempted to achieve the same end by the filing of grievances concerning these positions and the occupants of these positions holding

union offices. This also was without success. Various union officials attempted to persuade Ball that success of such an endeavor would deplete the unit strength by approximately 10 percent thus reducing the income of the C-E unit, and/or the Local, as well as removing approximately 10 percent of the employees from the protection of the collective-bargaining agreement. It appears also that many occupants of these positions were also opposed to such endeavors for the same reasons. And, indeed, on February 9, 1976, in connection with a controversy between Ball and one of the occupants of these positions named Bert Nelson, the Guild requested its counsel, Robert Lipsitz, to write to Ball and advise Ball of the potential adverse consequences to the Union should such a petition be successful. In that letter Lipsitz stated, *inter alia*:

While you may seek such result, and although I believe BNG and TNG would resist such result, my client's view is that such a result would be contrary to the interest of a great majority of its membership.

Thus, should you trigger such a change of events by the filing of the charge, at least you should be aware of the possible consequences and the fact that they would be adverse to the interest of your fellow employees . . . .

However, prior to this time, on June 18, 1975, Ball wrote directly to the Executive Secretary of the Board wherein he expressed his belief that these classifications were Section 2(11) supervisors and should be excluded from the unit. He briefly outlined his unsuccessful attempts to have this done and expressed the view that some officers and agents of the Local who came into those classifications had developed an extreme hostility toward him and his endeavors. He also advised that many of the "supervisors" hold key positions in the administration of the affairs of Local 26, and are able to frustrate any attempt to clarify the collective-bargaining unit. In short, Ball requested the Board to "waive the rules in this instance and authorize the filing by me of a unit clarification petition aimed at determining the appropriateness of the bargaining unit covered by the working agreement between Local 26, Buffalo Courier Express unit and the company, the Buffalo-Courier Express, Inc."

There is no dispute that throughout the collective-bargaining relationship between the Guild and the Buffalo Courier Express, all these classifications had been considered included in the unit. Indeed the employer's chief labor counsel and negotiator Robert Kopp testified that for many years he sought to have these classifications excluded from the unit and to award them supervisory functions. Kopp testified candidly that his purpose in this was (1) to reduce the number of employees subject to the contract which would give the employer more direct control over them, and (2) in the event of a strike he would have more employees available to report to work and continue with the business of the company.<sup>17</sup>

<sup>15</sup> Ball was only fined and reprimanded for having attempted to interfere with the Union's conduct of its business by attempting to nominate 208 individuals for 7 positions to the national convention.

<sup>16</sup> The petition seeks specifically to include: All editorial department employees. Excluded: All supervisors, assistant city editors, telegraph editors, rotogravure editor, make-up editor, picture editor, slot man, sports editor, special projects editor, suburban editor, assistant Sunday editor, food editor, focus editor, chief photographer, assistant sports editor, assistant suburban editor, and assistant telegraph editor.

<sup>17</sup> It should be noted that the Courier Express also had collective-bargaining agreements with seven or eight other press-related unions involving

*Continued*

By letter dated June 24, 1975, the Executive Secretary of the Board responded to Ball's June 18 letter wherein he, *inter alia*, advised Ball that "although supervisors as defined in the Act are not entitled to the Act's protection, and, although the Board will not knowingly include in the collective-bargaining unit individuals who are, in fact, supervisors, Section 14(a) of the Act makes clear that supervisory membership in a union is not unlawful. Similarly, although an employer has no obligation to bargain with respect to the terms and conditions of supervisors, it is not unlawful for an employer and union to include supervisors in the collective-bargaining unit voluntarily."<sup>18</sup>

Ball was also advised that Section 102.60(b) of the Board's Rules and Regulations provides that "a petition for clarification of an existing bargaining unit . . . may be filed by a labor organization or by an employer." The Executive Secretary, having no authority to waive the rule which the Board has adopted, suggested that Ball pursue the matter and bring it to the Board's attention by filing a unit clarification petition in the Buffalo Regional Office and, if the petition were dismissed, he might appeal the Regional Director's action to the Board.

Thus, in short, it appears that the Board waived Section 102.60(b) of its Rules and Regulations to permit Ball to file such a petition.

The record does not disclose precisely why Ball waited from June 25, 1975, when he received permission to file the petition until March 10, 1976, when he did file the petition. It appears that in the meanwhile he was engaged in attempting to resolve the issue as he perceived it by other means. As was almost inevitable, on March 23, 1976, the Acting Regional Director for Region 3 issued a Decision and Order wherein he dismissed the petition under the "clear and unambiguous language of Section 102.60(b) of the above quoted Rules and Regulations . . ." which as heretofore noted provided that such petition may be filed only by a labor organization or an employer.

On March 30 and 31, four members of the Local, Robert L. Naylor, Robert O. Groves, Martha L. Lane, and Patricia Swift, prepared and served upon Local 26's secretary, David G. Stout, formal charges against William Ball alleging violations of the Newspaper Guild's constitution, article 12, section 1(a) and (m).<sup>19</sup> Section 2

ing other of its employees. However, it appears that this was the largest of the units.

<sup>18</sup> Sec. 14(a) of the Act provides: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals as defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." The Board also held in *Marinette Marine Corporation*, 179 NLRB 627, 629 (1969), that there was no *per se* 8(b)(1)(A) violation for Sec. 2(11) supervisors to hold offices within the union where it is clear they are selected by the union rather than the employer.

<sup>19</sup> Art. 12 of the said constitution deals with discipline of members. Sec. 1 thereof provides: "Offense. The following acts are offenses for which members may be disciplined. (a) Willful violation of this constitution or the constitution or by-laws of any branch of the TNG, or any willful action tending to defeat the constitutional purposes of the TNG . . . (m) acting in any wise to circumvent, defeat or interfere with: (1) collective bargaining between the Guild and employer; (2) existing collective bargaining agreements."

of said charges deal with the specific acts of Ball and briefly outlines his endeavors to have a unit determination resulting in the possible exclusion of 10 percent of the unit. Item 3 of the charge states:

The charges herein are based upon the efforts of William Ball, as aforementioned to diminish the bargaining unit at the Courier-Express, efforts, which if successful, circumvent, defeat and intervene with the collective bargaining, and also with the existing bargaining agreement, all in violation of the foregoing sections of the Newspaper Guild's constitution.

Notwithstanding the above, nothing in these charges are intended to prohibit a member from the lawful and appropriate processes of the NLRB which, however, were not properly used by William Ball as above set forth.

As heretofore indicated, within a short period of time two additional internal union charges were filed against Ball on unrelated matters. On May 25, 26, and 27, 1976, Ball was brought to trial before, insofar as I can determine, a duly established trial board under articles 12 and 13 of the Newspaper Guild's constitution and article 9 of the Buffalo Newspaper Guild bylaws. Although the trial board received evidence relating to all three charges during this 3-day period, each charge was isolated, and evidence relating to that specific charge was independently considered by the trial board. The trial board, which it appears is a standing board, was composed of Robert Buyer, chairman, Mort Carpenter, Kelly Simon, George Sullivan, and Jackie Tasch. Ball was prosecuted by one Richard E. Baldwin, a union member. Insofar as the voluminous transcript of the trial board proceedings reveal, although not adhering to legal rules of evidence in all instances and notwithstanding Ball's complaint that he was denied "a change of venue" and the right to have an attorney present with him, I find nothing in the transcript or the findings of the board to indicate that there was any lack of due process involving its procedure or consideration of Ball's contentions. In its findings and decision the trial board again reviewed the facts relating to Ball's endeavors to have certain classifications excluded from the unit, which is not in dispute, and concluded in substance that Ball's argument that the outcome of the C-E unit clarification would have the effect of strengthening the unit; but instead concluded that success of such petition would have in fact weakened the C-E unit. The trial board also considered Ball's repeated assertions that the charges in question herein were the culmination of an atmosphere of hostility and harassment by the unit and Local 26 and its officers dating back to 1973 relating to the previous case before the Board, and found that such contention would be relevant only if it affected the credibility of essential evidence. In short, the Board concluded that Ball was guilty as charged and concluded that "in view of the seriousness of the charges which the trial board found Mr. Ball guilty, we see no reasonable alternative to expelling Mr. Ball from the Newspaper Guild and its Local 26, and so order. We further assess a fine of \$1,125." The trial board findings, conclusions, and

discipline in this regard was affirmed by the Newspaper Guild on July 8, 1976.

#### Analysis and Conclusions

Prior to addressing briefly the respective arguments of the Respondent and the General Counsel, it should be noted that the general rules applicable to union disciplinary proceedings was set forth by the Supreme Court in *Scofield v. N.L.R.B.*, 394 U.S. 423, 430 (1969), wherein the Court held that a union may enforce by disciplinary action a properly adopted rule without violating 8(b)(1) where: The rule "reflects a legitimate union interest"; the rule "does not impair any statutory labor policy"; the rule is "reasonably enforced against union members who are free to leave the union without harming their employment rights."

It's well settled, as asserted by the General Counsel, that a union member may be expelled, but not fined, for initiating a decertification or deauthorization petition. *Blackhawk Tanning Co., Inc.*, 178 NLRB 208 (1969); *Tool and Die Makers Lodge No. 113, etc. (Midwest American Dental Division of American Hospital Supply Corporation)*, 207 NLRB 795 (1973). The rationale underlying this permission for disciplinary action against union members is obvious since such petitions attempt to destroy the union and permits the union to rid itself of persons being privy to union plans when they seek to destroy the union by such activity. However, it is equally clear, based upon Board and court cases that a union may not retaliate against a union member for filing unfair labor practice charges with the Board. See *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), nor does it appear under *N.L.R.B. v. Industrial Union of Marine Shipbuilding Workers of America [United States Lines Co.]*, 391 U.S. 418 (1968), that action may be taken against union members for filing unfair labor practice charges without exhausting internal procedures where the charge concerns a matter beyond the internal affairs of the union.

The General Counsel would urge that the filing of a UC petition is more analogous to that of an unfair labor practice charge whereas the Respondent argues that it is more analogous to that of a decertification petition, because it tends to undermine and impede the strength and bargaining power of the union.

In my view I need not reach either of these arguments. While the Respondent Union argued both at the hearing and in brief with respect to the detrimental effect that the success of such a petition would have upon the Local, possibly to the extent of destroying it and certainly making it less effective, such is not the controlling factor in this case.

Under the unique circumstances of this case, circumstances which I do not believe will ever arise again, I have no alternative under the teachings of *Scofield*, *supra*, but to find and conclude that Local 26, and the International Guild violated Section 8(b)(1)(A) by bringing internal union charges against William L. Ball; bringing him to trial on those charges; finding him guilty; expelling him from the Union; and assessing a fine upon him. As noted, *Scofield* holds that a union may enforce by disciplinary action a properly adopted rule without violating Section 8(b)(1) where "the rule does not impair statu-

tory labor policy." The primary statutory labor policy in the United States is the National Labor Relations Act and the agency administering that Act is the National Labor Relations Board. Thus, where the agency administering the major statutory labor policy in the United States expressly grants an individual the right of access to its procedures for a given proceeding, albeit, in apparent conflict with its own rules and regulations, the granting of such permission to an individual is, in my view an extension of the statutory labor policy. Accordingly, it would be totally unconscionable for the agency to permit a labor organization to discipline a member in any manner for engaging in activity which it had expressly permitted.

Accordingly, I shall order that the fine of \$1,125 be rescinded, that the internal union charges brought against Ball concerning this matter be likewise rescinded and expunged from all union files, and that Ball be notified of such action. However, in view of my findings and conclusions hereafter with respect to other charges brought against Ball, I shall not order that Ball be reinstated to the Union. Cf. *Philadelphia Moving Picture Machine Operators' Union, Local No. 307 v. N.L.R.B.*, 382 F.2d 598 (3d Cir. 1967); *N.L.R.B. v. Wilson Freight Company*, 604 F.2d 712 (1st Cir. 1979); and *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

It should be noted in this connection that there is no reliable evidence of record that the Union ever endeavored to have Ball's employment with the Courier Express affected nor is there any reliable evidence that it failed or threatened to fail to continue to represent Ball. Notwithstanding Ball's testimony that, during a recess of the trial board hearings, two members of the trial board told him that they would oppose the Union's continued representation of him in the event he were expelled from the Union.

#### D. Charges Relating to the Alleged Disruption of Intraunion Processes on April 8 by Ball

The charge and trial of Ball with respect to this event arises out of Ball's endeavor to submit into nomination 208 names for 7 delegates to attend the national convention along with "slates" which Ball attached to the names, some of which appear to be derogatory. While there are as many versions of what transpired at the April 8 union meeting wherein these nominations were made, as there were witnesses who testified with respect thereto, there is little if any essential dispute with respect to the substance of the charges filed against Ball. The essence of Ball's conduct as relating to the charges concerns his endeavor to submit into nomination the names of 208 nominees for 7 delegates to the national convention the two most of which he had attached a "slate" and most of which may reasonably be interpreted as derogatory in nature.

Ball testified that on April 1, he mailed a copy of his proposed nominees and their "slates" to Local 26's secretary, David G. Stout.<sup>20</sup>

<sup>20</sup> Stout denies having received a copy of these proposed nominations prior to April 8.

Ball, who had been elected to the Local executive committee taking office on April 1, 1976, attended the executive committee meeting preceding the regular union meeting during which nominations for delegates to the national convention were to be made as well as the conduct of other business. While there is some testimonial conflict as to precisely what occurred, as heretofore noted, because of Ball's intensely obsessive involvement with the Union and his equivocal testimony concerning these events, I find his version to be unreliable when in conflict with other testimony which I credit.

Be that as it may, several items of business were discussed at the executive committee meeting and Ball stated that he had a number of nominations that he wanted to make for delegates to the national convention. It appears that Ball would be unable to attend the entire regular union meeting due to a conflict with his work schedule. However, it appears that Ball did remain for a portion of the meeting wherein he requested that the order of business be changed so that he may submit his nominees for the international convention. This motion was denied and Ball was advised that he might get any qualified number in attendance at the meeting to make the nominations on his behalf. At this point, I am convinced and find that the officers of the Union had no idea as to the number of nominees Ball intended to place in nomination and/or the slates, most of which are unsavory, attached thereto. Be that as it may, it appears that Ball left the list of 208 nominees with the accompanying slates with Cliff Preisigke and a copy also with Kenneth Kostolecki.

As heretofore noted there are as many versions of the sequence of events occurring at the April 8 meeting as there were witnesses in attendance, albeit, some versions are reconcilable, I find that the minutes of that meeting as prepared by the Local secretary, David Stout, to be more reliable as an indicia of the sequence of events occurring at the meeting. It appears that these minutes were prepared simultaneously or at least from the notes simultaneously made by Stout as the Local secretary. Moreover, in that position Stout would have a greater responsibility to observe and record the sequence of events as they occurred. Based upon those minutes, much of which are not in irreconcilable conflict with a consensus of many other witnesses, it appears that the meeting was called to order at 8 p.m., and a number of items, not particularly pertinent here, were disposed of, including unit reports from the chairman of the C-E unit, the TNG unit and the BNG unit. Among the decisions made at that meeting was that Local 26 would send seven delegates to the TNG convention in Washington, at which point the floor was opened for nominations to that convention.

From these minutes it appears that one individual nominated five individuals, three of whom were officers of the Union, to be delegates to the convention, and three other individuals made one nomination each. At this point Cliff Preisigke arose and commenced reading from the list of names which Ball had left with him for nomination to the convention. It appears that Preisigke did not include in his reading of the names the "slates" that had been attached thereto by Ball. However, several

of the nominees which Preisigke read had already been nominated, and others who had not, rose to withdraw their names from nomination. It appears also that there was a motion by a member "Roth" that Preisigke be required to get written acknowledgement from people who were on the list as to whether they would run. This motion was ruled out of order.

Patricia Swift withdrew her name from the list and called the list read by Preisigke bearing Ball's signature "one more attempt by Mr. Ball to obstruct the election of this local." Others then withdrew their names and after a point,<sup>21</sup> Ray Hill made the statement that he and Patricia Swift would bring trial board charges against Preisigke on the grounds people on the list were not asked if they wanted to run; "that the nominations are facetious; that they are tying up the Local."

After this "rhubarb," as described by Preisigke, he requested permission to withdraw the nominees. However, the presiding officer, Paul MacClennan, was unsure whether or not he could do so once the nominations were made, telephoned the Local's counsel, Robert Lipsitz. Apparently Lipsitz advised MacClennan that there were no barriers to withdrawing nominations of his own free will if he wished to do so since it was reported to Lipsitz that Preisigke was unaware of certain remarks printed next to the names on the list he had gotten from Ball and that he had no desire to be facetious. MacClennan then permitted the list to be withdrawn. Several other nominations were then made and no one present declined.

While the minutes of the April 8 meeting do not reflect the fact, there is substantial testimony that the list of names given to Preisigke was given to Stout who then read the entire list of names along with the "slates" attached thereto by Ball to the entire membership, which appeared to cause a great deal of "anger," "resentment," and "humor." Thereafter other business was conducted by the Local and the minutes of the meeting indicate that the meeting was adjourned at 11 p.m.

It is true, as argued by the counsel for the General Counsel, that neither the Guild constitution nor the bylaws limit the number of nominees that any member may make for any position or positions for which nominations are open. However, one must conclude that the failure to so limit does not provide a license to any individual member to make this unreasonable number of nominations, and presumes that members will make nominations in a serious manner and in a manner designed to not unduly impede the orderly process of the Union's business.

It appears that under the bylaws of the Local, all nominations for delegates to the national convention as well as other officers for positions in the Union must be made by a member in good standing from the floor. If the member nominated is not in attendance at the meeting, that member is contacted generally by the office secretary or some other union official to ascertain if the member wishes to remain in nomination. There is no re-

<sup>21</sup> It is unclear as to how many names Preisigke read from the list before the "turmoil commenced which resulted in a total disruption of the meeting."

quirement that a person desiring to nominate an individual obtain the individual's permission in advance, which is probably the reason Roth's motion that Preisigke be required to get written acknowledgment from people on the list was ruled out of order. Ball admitted that he had only spoken with about three of the nominees which he had placed into nomination; however, as noted, there is no requirement that he did so. In this regard it might also be noted that, at another nominating convention, Ball was permitted to place into nomination some 24 names, however, it does not appear that derogatory slates were attached thereto.

In my opinion, the Union had a legitimate interest in enacting in its constitution article 12, section 3(c), concerning "willful action tending to defeat or impede activities of TNG or any of its branches and in furtherance of the constitutional purposes of TNG. Thus, the question here in my view is whether or not Ball's activities in attempting to nominate 208 individuals (approximately 40 percent of the entire unit), along with many derogatory slate names which would likely have a tendency to cause defection and resentment among the members, was a willful intent to interfere with and impede the orderly process of the Union's business sought to be protected by article 12(3)(c) of the TNG constitution.

Although not limited by the constitution or bylaws as to the number of nominees an individual member might make, in my view, the mere endeavor of a member to nominate 208 individuals, along with slate names which are at best not complimentary, is close to a *per se* willful endeavor to impede the orderly process of the Union's business. In this particular instance, this conclusion is bolstered by Ball's testimony concerning his reasons for so doing. First, he testified that he wanted to generate greater interest in the Union and obtain better attendance at union meetings. I fail to see how this facetious endeavor could achieve that end; but, would rather more likely have the effect of obtaining the adverse result. Secondly, Ball testified that he sought, by submitting this number of nominees, to have "the entrenched leadership" ousted from office. Again, these nominations were for delegates to the national convention which could have at least a minimal impact on achieving the goal Ball says that he sought to achieve. Ball also testified that he endeavored to make these nominations and the slate names so they would not "have an isolated view," however, he could not explain how attaching slate names to the nominees, many of which he had bitterly opposed and many of which he had sought to have excluded from the unit, could achieve this result. Finally, after testifying that the slate names attached to the nominees had no significant meaning, Ball admitted that many of them did.<sup>22</sup> As noted, Ball ultimately admitted that the slates he attached to these names could have had some hidden meaning.

<sup>22</sup> Without attempting to exhaust the numerous slate names attached to various names which Ball attempted to have nominated on November 8, there are slates such as "womans slate"; "play slate"; "company slate"; "closed door slate"; ".38 slate"; "secrecy slate"; "date slate"; "me to slate"; "adjourned now slate"; "boy slate"; "girl slate"; "blond slate"; "Shirley Temple slate"; "burn the boat slate"; "rock the boat slate"; "Sally slate"; "committee slate"; "Mr. nice guy slate"; "underdog slate"; and the "limey slate."

The Respondent argues at great length concerning the amount of time and the money that would be involved in contacting each of the 208 nominees by Ball, had they not been withdrawn by Preisigke. I do not need to reach that argument. Nor do I find that the threat of Hill and Swift at the meeting to bring charges against Preisigke, under the circumstances here; for it appears that at that time they did not know whether or not Preisigke was acting in concert with Ball or was merely an innocent tool of Ball to violate Section 8(b)(1)(A) of the Act as alleged by the General Counsel.

As noted, Patricia Swift and Raymond Hill filed charges under article 12, section (1)(c) of the Newspaper Guild's constitution which I find is an appropriate section for the charges to be brought in this instance. Ball does not deny, and did not deny at the trial board proceedings, his having attempted to place such names into nomination nor, indeed, does it appear that he was not aware of, or intended that it would create, an impediment to the Union's orderly process of business to have to consider all of the names he had submitted into nomination. It appears that at the trial board proceedings Ball's sole defense in this regard was that the order issued by the Board in 1975 in connection with the previous case precluded the Union from bringing intraunion charges against him. The trial board, as I do, found this argument does not have merit, for the Board's order there did not give Ball immunity to flaunt union rules with impunity. Thus the rule here in issue, and for which Ball was tried, is one of legitimate union interest which was deliberately flaunted by Ball, and I find that the trial board's finding Ball guilty on this charge and determining that he should be reprimanded for this action and fining him \$250 to be warranted. Upon Ball's appeal to the TNG, the TNG rescinded the \$250 fine imposed upon Ball on the basis of this charge but left intact the reprimand. Since the TNG has rescinded the \$250 fine, I need not consider that at this point. I uphold the reprimand issued to Ball for his actions in this regard and find that the Respondent did not violate Section 8(b)(1)(A).

See *United Brotherhood of Carpenters, and Joiners of America, Local 1913, et al.*, 189 NLRB 521 (1971), wherein the Board upheld the reprimand imposed upon a member for asserting Section 7 rights in the hiring hall which disrupted the hall's operation. The Board held that the union had an important interest to protect the orderly operation of the hall. Therefore the fine was upheld.

*E. Charges, Trial, and Discipline Relating to Ball's Alleged Unauthorized Filing of Charge with the EEOC Against the Buffalo Courier Express*

The internal union charges, the trial board proceedings, and the disciplinary action taken against Ball for filing these charges with EEOC raises by far the closest question in this case. As heretofore indicated, from approximately September 1975 until sometime in the spring of 1976, Ball was the C-E unit grievance chairman, an appointed position. As noted in connection with the discussion concerning Ball's credibility, it appears that at a

November 8 executive committee or union meeting, there was some discussion concerning certain environmental conditions existing in certain areas of the Buffalo Courier Express, and it would appear from that discussion that Ball was authorized to investigate the various Federal and state agencies which might be of assistance in solving the perceived problems should they not be able to resolve them under the contractual provisions with the Courier Express. However, it appears that this is the extent to which the membership or the officers authorized Ball to proceed as grievance committee chairman at that time.<sup>23</sup>

Be that as it may, on January 20, 1976, Ball typed and apparently hand-delivered a charge to the United States Equal Employment Opportunity Commission, alleging that Buffalo Courier Express, Inc., was engaging in racial, religious, and sexual discrimination. In that charge, under the caption of person filing charge, Ball listed himself as grievance committee chairman, Local 26 BNG, Courier Express unit.

In explanation of the alleged discrimination in that document Ball stated:

That the Buffalo Courier-Express is discriminating against employees in regard to hire and promotion because of their race or color, religious creed and sex. Women, blacks, black women, Jews, and other minority race members are systematically being denied promotions or consideration for promotions, assignment to specific jobs, consideration for specific job duties including elevation to submanagement or management positions solely because of their being members of the aforementioned minority groups.

The EEOC referenced this charge as "TBU6-0271, and the acting district director that date sent to Ball a letter noting that he should file the charge with the New York State Division of Human Rights, and forwarded the charge to them and enclosing information for persons filing charges with the U.S. Equal Employment Opportunity Commission and noting the requirement that prior to investigation by the EEOC it must be deferred to the State of New York Human Rights Division.

By letter dated January 22, Ball was advised by the Division of Human Rights of the State of New York that the EEOC had referred his civil rights charge filed under the 1964 act which conferred jurisdiction upon the New York State Human Rights Division and instructed him to refer correspondence to the attention of a stated individual.

I believe it is unnecessary here to go into great detail of "the synopsis" of the basis of the charge which Ball submitted on January 29, to the State Division of Human Rights; however, it dealt generally with the contention that the employer was engaging in anti-Semitism because of the lack of visibility of different religious groups and

the asserted endeavor by the Company to ascertain the religious affiliation of wide segments of the population. In this regard he specifically addressed two issues which he contended demonstrated this type of discrimination; one dealt with a former employee by the name of Staunton Samuelson who had left the Courier Express and the other with an employee named Harlan Abbey.

In this "synopsis" Ball contended that Samuelson had expressed to him on numerous occasions the conviction that he was not promoted or given an opportunity for advancement because of his being a Jew and that Abbey had likewise expressed his feelings that he was a victim of religious discrimination and had no chance for advancement.

Ball then dealt with other areas of his alleged discrimination charge which again was general in nature and expressed the concern that some departments seem tailored to accommodate women, and in those departments women had opportunities for advancement and contended that the mere setting aside of these departments for women made them a "virtually exclusive domain of women." He enumerated a number of other specific cases which he contended he had received complaints about.

Be that as it may, it was not until March 25, 1976, that Ball was advised by the EEOC that his charge, pursuant to the requirement of Federal law, was being sent to the employer against whom the discrimination charge was filed. It should be noted in this regard that neither the employer, the Buffalo Courier Express, nor the Union were served with charges which Ball had filed against the Courier Express in January.

Ball's testimony, notwithstanding the statements made by him in his statement of "specifics" filed with the New York State Division of Human Rights on January 29, 1976, reveals that not more than two employees had expressed to him the view that they were being discriminated against by the Courier Express, and one of those, it appears, had been remedied through the grievance procedure. Consequently, as demonstrated by the document itself, most of Ball's assertions, or examples, of discrimination were based upon his own observations, as he perceived them and not upon any factual or statistical reality.

Upon receipt of the March 25 notice sent to it by the EEOC commission, the general manager of the Buffalo Courier Express telephoned the C-E unit chairman concerning the filing of such charges and apparently expressed the view that such filing by the Union demonstrated the Union's lack of good faith and could seriously jeopardize the collective-bargaining relationship existing between the Local and the Courier Express. Indeed, it appears that he threatened to refuse to proceed with the resolution of any more grievances until the matter was disposed of satisfactorily.

The C-E unit chairman then telephoned Local 26 president, Paul MacClennan, who also was unaware of any charges filed with the EEOC on behalf of the Union, and apparently relayed the position of the Courier Express with respect to such filing.

<sup>23</sup> As noted in the above discussion concerning Ball's credibility, I have found that the several writings spanning November 8 through January 3, 1976, were all Ball's writings intended to gradually enlarge upon what had been agreed upon at the November 8 meeting and thus cloak him with color of authority to file charges directly with any state or Federal agency.

While the record is not entirely clear as to what transpired, it is clear that MacClennan, or some other union official, conveyed to the EEOC, and probably the New York State Division of Human Rights, that the Union was not the charging party in that case and wanted no part in the continued prosecution of the case. Shortly thereafter, Ball was notified by the EEOC that the case was being administratively closed for this reason.

It appears from the record that the unauthorized, and apparently reckless, filing of these charges with the EEOC against the Buffalo Courier Express at this particular time placed a strain upon the relationship between the Union and the Company, for at that time they were having biweekly meetings in an attempt to dispose of the substantial backlog of grievances, and due to the asserted financial position of the Courier, which was latter verified by independent auditors of the Local, consideration of whether or not to waive the contractual wage increase due at or about that time. In addition, it appears that about this time the continued existence of Local 26, as an entity, was being jeopardized, in part because of the large amount of time spent at the monthly union meetings in discussing and disposing of Ball related complaints and other activities which included grievance filings and demands for arbitrations which occasioned a greater expense on the Local. The record discloses that the BNG unit, the second largest unit in the Local, had commenced, or had at least threatened to commence, action to disassociate itself from the C-E unit and become an autonomous entity.

On April 6 and 8, eight union members filed internal union charges against Ball, and served them upon David Stout, secretary of the Local,<sup>24</sup> alleging in substance that Ball had violated article 12, sections 1(a)(c) and (m), of the Newspaper Guild's constitution.<sup>25</sup> The substance of the charges is simple; that Ball had as unit grievance-committee chairman filed the EEOC charges against the Buffalo Courier Express "without regard to whether or not the allegations and the charges are truthful, and the Buffalo Courier Express has in fact discriminated as alleged in those charges." It asserts that Ball was never authorized to file such charges in the name of the Union and that in so doing he was in willful violation of the constitutional provisions cited above. Item 40 of the charge, as with that involving the filing of the UC petition advised Ball that:

<sup>24</sup> The complaint alleges only that the charges filed by Robert Walburn and Richard Haynes; however, it appears that E. Kelly, A. Lowry, M. Hiltzik, W. Cook, D. Smith, and R. Beer, also joined in filing the charges against Ball.

<sup>25</sup> See fn. 19 for the contents of art. 12, sec. 1(a) and (m). Sec. 1(c) of that article reads:

Disobeying and failing to comply with any lawful decision or order of TNG or of any body with jurisdiction over the member, or any willful actions tending to defeat or impede activities of the TNG or any of its branches in furtherance of the constitutional purposes of TNG.

Notwithstanding the above, nothing in these charges are intended to prohibit a member from the use of the processes of the EEOC in his own individual capacity. The false representation to that agency that he had authority of the Buffalo Newspaper Guild to use these processes and that he spoke for the Buffalo Newspaper Guild are the acts which are involved in this charge.

About this time Ball was removed as chairman of the grievance committee for the C-E unit and by letter, on at least two occasions, Local President MacClennan wrote Ball requesting Ball to return to him all documents or materials relating to the EEOC suit and also documents and materials relating to C-E grievances pending during Ball's tenure as C-E grievance committee chairman. It is undisputed that Ball failed to comply with this request.

As heretofore noted, a close scrutiny of the voluminous verbatim record of the trial board proceedings and the decision of the trial board relating to this and the other charges, failed to disclose any lack of due process to which Ball was entitled. It appears that in connection with this particular charge, the trial board considered only evidence relevant to this charge and did not consider irrelevant or immaterial evidence.

At the hearing herein, Ball contended that the trial board refused to continue the case when he pleaded that he was fatigued and needed to rest, and that it refused to accept into evidence exhibits which he proffered, which appears to be the General Counsel's Exhs. 6(a) 7, 8, 9, and 10. However, it also appears from Ball's testimony that at the conclusion of the trial he did present these documents to Robert Buyer, the chairman of the board, and requested that they may be made a part of the record. Buyer denies that Ball presented any additional exhibits or that he attempted to do so and there was testimony that the exhibit file, which apparently had been retained by the TNG in Washington and been examined, did not contain these documents.

As heretofore noted, in my view those documents taken at face value would not confer upon Ball the authority to act for the Local or the National Guild in filing charges of this nature with the EEOC. Indeed, as noted above, there is more than "some" evidence tending to indicate that the documents may have been prepared by Ball as an afterthought to cloak himself with the color of authority to so act. On the other hand, it is evident from the alleged letters, again assuming the validity of the documents, dated November 22 to MacClennan and January 3, 1976, to Stout, both of whom deny receipt of any such letters, that Ball did not believe himself to be empowered to go directly to EEOC on behalf of the Guild. Therein, he is clearly seeking "an authoritative statement" concerning the extent of this authority in that regard. Ball does not contend, except by the motion that he alleges was adopted on November 8, 1975, to have ever received any specific permission to act for Local 26 or the C-E unit with respect to filing charges with Federal or state agencies.

Before me, the General Counsel urged that Ball should not be held responsible for what EEOC placed on the complaint, to wit: that it was filed by Ball as chairman of the grievance committee of the Courier Express unit. Ball, it appears, made the same contention to the trial board during that proceeding. Ball himself, by the caption he placed on the charge he filed with EEOC to wit, chairman of the grievance committee of the Buffalo Courier Express, clearly indicated that he was purporting to file the charges on behalf of said Union and was respon-

sible for the interpretation period thereon by EEOC. Thus, such defense is clearly facetious and without merit.

In short, the trial board found Ball guilty of violations of article 12, sections 1(a) and (c), of the TNG constitution for which it imposed the penalty of expulsion from the Newspaper Guild and assessed a fine of \$1,125. With respect to the charge under article 12, section 1(m), the trial board found that while Ball's unauthorized filing of the EEOC discrimination suit against the Courier Express did cause considerable anguish during a delicate period of negotiations with management on grievance matters and ongoing contract negotiations, the incident did not seriously impair those discussions since the Local president intervened quickly to quash the discrimination suit. Accordingly, it acquitted Ball on that particular charge.

#### Analysis and Conclusions

It appears that counsel for the General Counsel and the Respondent's counsel agree that there are no Board or court cases directly on point with the issue presented here. While not taking issue with the Respondent's contention that only the Guild could authorize charges of any type to be filed with state or Federal agencies in the name of the Union, counsel for the General Counsel contends that Ball was so authorized at the November 8, 1975, meeting. I have found above that Ball received no such authorization at that meeting or at any other time. This finding, as I have noted above, is bolstered by Ball's November 22, 1975, letter to MacClennan and the January 3, 1976, letter to Stout, where he appeared to be seeking such authority.<sup>26</sup> The General Counsel appears to argue that even if Ball had not been given such authority, the internal union charges, trial, and conviction of Ball pertaining thereto was motivated, not by his having exceeded his authority in that respect, but in retaliation for his dissident conduct toward the "entrenched leadership," and his many other activities which were protected and concerted and therefore within the protection of Section 7 of the Act. In addition thereto, he further contends that this action was taken to prevent Ball from taking the seat on the executive committee to which he had been recently elected.

In support of his contention that the Local's action was thus motivated, he points to the 8(b)(1)(A) violations found in the previous Board case and the complaint allegations in the instant case which would demonstrate animus toward Ball,<sup>27</sup> as well as quoting extensively from numerous publications of the "Frontier Reporter," the official monthly publication of the Local, designed to keep the membership advised of the Local's activities

and articles relating to Ball and his various union activities. As might be expected, there were many such articles dealing with Ball and his various activities relating to the Union and the membership, for he was undoubtedly the most active member of the Union. I have reviewed these quotes and find that they are accurate accounts of Ball's activities. While most of the articles generally recite the official union position to be contrary to Ball's activities, I find nothing therein to convince me that these articles are sufficient to demonstrate animus against Ball.

As repeatedly stated above, there is no doubt that the Local and C-E officers, as well as many members, resented Ball's activities and felt that many of them constituted an undue interference with the administration of the contract as well as the orderly conduct of other union business.<sup>28</sup> Thus, the conclusion is warranted that it welcomed the opportunity to get Ball out of the Union. The question here, as in *Klate Holt Company*, 161 NLRB 1606 (1966), is whether Ball gave them a legitimate reason to expel him from the Union and that they did so for that reason, or whether they merely seized upon that activity to expel him for engaging in protected concerted activities and attempting to form a dissident group to oust the entrenched leadership.

The Respondent does not take issue with the General Counsel's argument that the filing of charges by individuals relating to discrimination in their employment with various Federal and state agencies is protected concerted activity and neither the employer nor the Union may discipline him for it. However, the Respondent contends that an individual loses that protection when he files such charges in the name of an entity, in this case the Guild, after consultation with legal counsel. Here, there is no dispute that there was such requirement.

The facts here must be analyzed and tested under the guidelines and teachings of the Supreme Court in *Scofield, supra*, wherein it held that a union may enforce disciplinary action against a member for violations of its rules where it meets the four tests set forth there:

#### 1. Was the rule properly adopted?

There is no evidence that the rule requiring Guild approval, after consultation with legal counsel, before filing charges or taking other action involving state and Federal agencies was not properly adopted, and the General Counsel does not contend otherwise.

#### 2. Does the rule reflect a legitimate union interest?

As stated above, in my opinion this rule reflected a legitimate union interest in that as a labor organization it had a legitimate interest in prohibiting its members from filing charges with various agencies in the name of the Union and without its express approval. A union, as an entity, may not agree with the views of an individual, but that individual is certainly free to file charges in his own name. Any action this rule prohibits has the poten-

<sup>26</sup> This is assuming the validity of such correspondence. As I have indicated, I have grave doubts that these letters were written and mailed as testified to by Ball, as I have doubts about Ball's November 8 motion, and the subsequent notices to employees prepared by Ball and allegedly posted on the bulletin boards, asserting that he had been given such authority.

<sup>27</sup> As found above in sec. III, B of this Decision dealing with credibility resolutions, and for the reasons stated therein, the General Counsel has failed to persuade me that the testimony of his three witnesses was reliable, and, accordingly, I will recommend that the complaint be dismissed with respect to all allegations not specifically found herein to be violations of the Act.

<sup>28</sup> As noted, it is not disputed that the BNG unit was seriously considering severing from Local 26 and becoming autonomous because of the time and expense Ball's activities were incurring on the Local.

tial of interfering with its collective bargaining, the administration of its contracts, and incurring of legal expenses. The above are only examples of the many legitimate interests a rule of this type serves.

### 3. Does the rule impair any statutory labor policy?

I can perceive of no statutory labor policy impaired by this rule since it does not restrain any individual from taking any action he wishes in his own name. It does not attempt to impair an individual from filing charges on his own behalf, or on behalf of others, even against the Union, the Employer or other persons, including charges that the Union failed to fairly represent him or other employees.

### 4. Is the rule reasonably enforced against members who are free to leave the union without harming their employment rights?

In my view, in this case the rule was reasonably enforced against Ball and the General Counsel presented no evidence that Ball was not free to leave the Union and escape application of the rule without harming his employment rights. Here it is evident that Ball knew he had no authority to involve the union in any EEOC charges against the employer based upon Ball's perceived violations of the Act and that he attempted to give himself a color of authority to do so by his own writings. It should be noted that Ball subsequently filed a similar charge with EEOC in his own name and no action was taken or threatened against him.

The General Counsel cites *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975), for the proposition that the filing of an EEOC complaint (there OSHA) is protected concerted activity. I find no fault with that citation, for there the charge was filed in the individual's name. He appears to contend that the activity Ball was engaged in was outside of internal union affairs; apparently relying upon *N.L.R.B. v. Union of Marine Shipbuilding Workers of America [United States Lines Co.]*, 391 U.S. 418 (1968). In that case the Court held that action may not be taken against a union member for filing an ULP charge without exhausting internal union procedures where the charge concerns a matter beyond the internal affairs of the union. I believe that case inapposite here. Here Ball's filing of the charge with EEOC is outside internal union affairs, and the rule sought to be enforced does not seek to prohibit such. However the evil sought to be prohibited by the rule is certainly an internal union affair.

The Respondent cites *N.L.R.B. v. International Brotherhood of Boilermakers, etc., AFL-CIO*, 581 F.2d 473 (5th Cir. 1978). That case also appears to be inapposite. There a union steward was removed from his position for filing a ULP charge without exhausting internal procedures as required by the union's constitution. The Board found an 8(b)(1) violation. However, the court refused to enforce, holding that the union had a right to demand support of its procedures by its officials.

In *N.L.R.B. v. Wilson Freight Company*, 604 F.2d 712 (1st Cir. 1979), the Board found that the respondent violated Section 8(a)(1), (3), and (4) when it fired a shop steward for making complaints to outside agencies in

excess of his authority as described in the contract and for voiding the employer's bid sheets for driving assignments. The respondent had warned the steward about making complaints to outside agencies. The court of appeals stated that such warnings did not constitute evidence of animus since the steward was limited to his actions by the contract. However, the discharge for voiding the employer's bid sheets was upheld under the test established by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

The usual disciplinary action against a union official for acting beyond, or outside, the scope of his office, or failing to adhere to internal union procedure, which the Board and courts have usually sanctioned, is removal from that office so that the member will no longer have the opportunity to abuse his authority, and on some occasions a fine. See *N.L.R.B. v. Wilson, supra*, and *N.L.R.B. v. Boilermakers, supra*, wherein it was stated that expulsion of an officer for failing to follow internal union procedures would not be acceptable.

As suggested by the cases cited to me by the General Counsel and the Respondent in their lengthy and well-prepared briefs, and as indicated by my own research, there does not appear to be any Board or court precedent based upon facts similar to those here. *Scofield, supra*, sets forth the four tests applicable and which must be met for the union to enforce compliance with its rules by any disciplinary action. The mere fact that the tests in *Scofield* are met does not permit a union to expel a member for any and every rule violations as suggested by the Respondent.

Expulsion from the brotherhood of union membership accompanied by the assessment of a fine is the ultimate penalty a union may impose upon a member, and even then it cannot affect that member's employment status and must continue to fairly represent that expelled member as is its statutory obligation. The parties have cited me but few guidelines, and in the Board and Court cases I have researched, I have found but few.

In *Boilermakers, supra*, the court held that the union had a right to demand support of its procedures and rules by its officers, apparently, whether elected or appointed, thus, indicating a greater duty on the part of such officers to comply with its rules and procedures than from a nonoffice member. In this case Ball was an appointed official of the Union at relevant times. It follows that the first query should be whether the rules or procedural violation was done knowingly and willfully or inadvertently mistakenly. In this case I have found that Ball filed the EEOC charge in the name of the Union knowingly and willfully in violation of the Guild constitution and the requirement that Guild approval be obtained after consultation with legal counsel.

In regard to the above, I have found that the act was not only done knowingly and willfully, but that Ball, through his own writings,<sup>29</sup> attempted to cloak himself with a color of authority to do so, which in my view makes even more grievous his conduct.

<sup>29</sup> Particularly G.C. Exhs. 6(a), 7, 8, 9, and 10.

A second query is, did the member or officer know, or have reason to suspect, that his conduct in violation of his union's rules had the potential of having an adverse impact upon the union membership and the union's ability to bargain collectively or administer a collective-bargaining agreement? Here, Ball as grievance chairman, was aware that the Employer and the Union were meeting biweekly in an effort to resolve a backlog of grievances and that there were negotiations over waiving the contractual wage increase due about the time because of the Employer's financial condition. In my opinion, Ball had every reason to know or suspect that the filing of such charges in the name of the Union, making allegations, some of which it appears had already been grieved, and others which had not been grieved or even brought to the attention of the Employer or the Union, would have an adverse impact upon the union-employer relationship and therefore, upon the union membership.

A third query, although in my view, not essential, is, did the member or officer have an alternative avenue to seek the ends sought to be achieved without violating his union's rules? Here it is evident that Ball had an alternative avenue to bring to the attention of EEOC matters which he deemed to be discrimination at the Courier Express, for he was absolutely free to file such a charge as an individual. The only thing he could not have accomplished in this manner is to have involved the Union and the resulting impact upon the relationship between the Union and the Employer.

Considering the foregoing, I find that Ball's conduct here is the type of conduct for which a union member may be fined and expelled. While Ball may have been acting in what he perceived to be the interest of the unit members, it is clear that he knowingly and willfully acted in violation of his Union's rules with a reckless disregard for the probable consequences of his act. Much as his attempt to introduce into nomination the 208 names on November 8, 1975, was a knowing and willful endeavor to impede the orderly processes of the Union. I am convinced that his conduct here had much the same purpose.

Accordingly, Local 26 did not violate Section 8(b)(1)(A) when it instituted internal union charges against Ball for filing the EEOC charge in the name of the Union; bringing him to trial before a duly designated trial board and, insofar as I can determine, awarding him due process throughout; determining that he was guilty of violating two of the three constitutional provisions upon which he was tried; and expelling him from union membership. However, as to the fine of \$1,125 assessed against Ball, there is testimony that a trial board member read a statement or proposed that the fines to be assessed be based upon dues the Union would expect to collect from Ball in the future. There is no evidence that the trial board utilized this formula in determining the amount of the fines. However, there is no evidence as to what formula, if any, was used. Thus, this is the best evidence before me and I shall assume it was the formula used. The fine must be rescinded for the Board has held that a union may not collect dues from an expelled member, *McGraw Edison Company, Food Equipment Division*, 181 NLRB 992 (1970). Since a union is barred from

collecting dues from expelled members, although it must continue to represent them, it follows that fines measured by future expected dues is an attempt by a union to collect by way of fines that which it is barred from doing; i.e., collecting dues. *New York Telephone Company*, 211 NLRB 114 (1974). Accordingly, I need not consider the reasonableness of the fine.

#### CONCLUSIONS OF LAW

1. The jurisdiction of the Board is properly asserted in this proceeding.

2. By filing internal union charges alleging violations of certain provisions of the Guild constitution; bringing William L. Ball to trial on those charges before an internal union trial board; finding him guilty of the charges; ordering him expelled from the Union; assessing a fine of \$1,125 against Ball, based upon the fact that Ball had on or about March 10, 1975, with the express permission of the Board, filed a petition in Case 3-UC-105; assessing a fine of \$1,125 against Ball measured by a formula based upon future expected dues after it had lawfully expelled him from union membership; the Respondent, The Buffalo Newspaper Guild, Local 26, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

3. By affirming the above acts of the Buffalo Newspaper Guild, Local 26, based upon a proper appeal of the above conduct, The Newspaper Guild, AFL-CIO-CLC, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

4. The Respondent or Respondents have not otherwise violated the Act.

#### THE REMEDY

Having found that the Respondents herein are guilty of violating Section 8(b)(1)(A) of the Act, they shall be ordered, jointly and severally, to cease and desist therefrom, and from any other unfair labor practices, and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Such affirmative action shall include the posting of the usual informational notice to members attached hereto as "Appendix" in accordance with the section of this Decision entitled "ORDER." The Respondents shall further expunge from its records the charges; trial board proceedings and the trial board decision relating to William L. Ball's filing of the petition in Case 3-UC-105, and shall notify Ball of such action. It shall be further ordered to rescind the fine assessed against Ball of \$1,125 which was assessed against Ball in the case arising out of Ball's filing of the EEOC charge in the name of the Union against Courier Express, since the fine was determined upon future dues it would have collected from him after he had been lawfully expelled from union membership.

However, the Respondents shall not be ordered to reinstate Ball to union membership. In *Philadelphia Moving Picture Machine Operators Union, Local No. 307, IATSE v. N.L.R.B.*, 382 F.2d 598 (3d Cir. 1967), several charges were brought against a member, some of which were found to be lawful and some unlawful. Only one vote

was taken upon all charges and it was impossible to determine whether disciplinary action would have been taken absent the unlawful charges. Here Ball was tried upon three separate charges, two of which I have found to be lawful. The evidence was taken separately and the trial board considered each charge separately and issued three separate decisions, none of which appear to have been influenced by the other charges. In *N.L.R.B. v. Wilson, supra*, the court of appeals, while refusing enforcement of certain findings by the Board, nonetheless found the discharge there to be bad since the employer had established that it would have taken the same action in the absence of the other conduct in accordance with the tests established by the Board in *Wright Line, supra*.

Since it is clear that Ball was expelled from union membership solely for his filing of the charge with EEOC in the name of the Union in violation of the Guild's constitutional provisions, and the unlawful charge brought against him played no role in that decision, he is not entitled to reinstatement.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following:

#### ORDER<sup>30</sup>

The Respondent, The Buffalo Newspaper Guild, Local 26, and The Newspaper Guild, AFL-CIO-CLC, Buffalo, New York, jointly and severally, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Filing internal union charges against members who, with the express permission of the Board, have filed petitions with the Board seeking unit clarifications.

(b) Bringing before an internal union trial board, and trying any member for such conduct.

(c) Finding any member guilty of violations of the Guild constitution, expelling that member from the Union, and assessing a fine for engaging in such conduct.

(d) Assessing a fine upon a lawfully expelled member, the amount of which was based upon the amount of dues

it contemplated collecting from that member absent his expulsion.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Expunge from its records the charges, trial board proceedings, and trial board decision relating to the petition filed in Case 3-UC-105 by William L. Ball, and notify Ball of such action.

(b) Rescind the fine of \$1,125 imposed against Ball in the case arising out of his filing of EEOC charges in the name of the Union in violation of the Guild constitution since such fine was imposed after Ball's lawful expulsion from the Union and based upon the amount of dues the Union expected to collect from him.

(c) Post at the office and meeting hall of the Buffalo Newspaper Guild, Local 26, and on the Union's bulletin boards at the Buffalo Courier Express, The Buffalo Evening News, and the Tonawanda Evening News, as well as The Newspaper Guild's office in Washington, D.C., copies of the attached notice marked "Appendix."<sup>31</sup> Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps the Respondent have taken to comply herewith.

IT IS FURTHER RECOMMENDED that the consolidated complaints, insofar as they allege violations of the Act not specifically found herein, are dismissed.

<sup>30</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>31</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."